FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 20 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 552.

WILLIAM R. MESTICE,
Petitioner,

vs.

ANTHONY MASI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

AND

BRIEF AND APPENDIX IN SUPPORT THEREOF.

WILLIAM R. MESTICE,
247 Broadway,
Newark, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

TABLE OF CONTENTS.

	PAGE
Petition for Writ of Certiorari	1
Opinion of the Court below	1
Summary Statement of the Matters Involved	2
Ruling of the Supreme Court of New Jersey	6
As to Jurisdiction of the Honorable Court	7
Questions Presented	11
Reasons Relied on for Granting the Writ	15
Prayers	15
Specification of Errors to be Urged	18
Brief in Support of Petition	1

Citations.

Campbell vs. *Gormley*, 104 So. E. 177, 185 Ga. 65	10
Charles vs. *City of Marion*, 98 F. 166	9
C. C. Ala., U. S. vs. *Moore*, 129 F. 630	9
C. C. N. Y., U. S. vs. *Billings*, 190 F. 359, modified *Billings* vs. *U. S.*, 34 S. Ct. 421, 232 U. S. 261, 232 U. S. 310, 58 L. Ed. 617	9
Davidson vs. *City of Orleans*, 96 U. S. 9, 24 L. Ed. 616	8
Murray vs. *Hoboken Land & Improvement Co.*, 59 U. S. 272, 18 Howard 272, 15 L. Ed. 372, U. S. N. J.	9
Risley vs. *City of Utica*, 173 F. 502, C. C. N. Y.	9

PAGE

U. S. Cal. Mooney vs. *Holohan*, 55 U. S. Ct. 340, 294 U. S. 103, 79 L. Ed. 791, Rehearing denied, *Ex Parte Rooney*, 558 Ct. 511, 294 U. S. 732, 79 E. Ld. 1261 10

U. S. Del. Ownbey vs. *Morgan*, 41 S. Ct. 433, 256 U. S. 94, 65 E. Ld. 837, 17 A. L. R. 873, affirming 1919, 105 A. 837, 7 Boyce 297 10

Yount Case, 267 F. 861 10

STATUTES.

United States Constitution:

XIV Amendment Sect. 1 6
Articles IV, V. VI, VIII 8, 14

New Jersey Constitution:

Article I 6
Article VI, Sect. II, Chapter 2, of Rights and Privileges,
No. 8 6
9 6
10 6
11 6
12 6

Rules of Practice of New Jersey:

2:8-1 6
2:8-2, a, d, e 6
2:8-3 6
2:9-1, a 6
2:9-2 6
2:9-3 6

PAGE

2:9-5 6
2:15-7-8 6
3:10-4 6
2:15-1 6
3:80-2, d 6
3:80-3 6

JUDICIAL CODE.

Act of March 3, 1911, C. 231, Ph. 268, 36 Stat. 1163, 28 U. S. C. A., Ph. 385 10

Code 1933, Ph. 24-105 10

36 Stat. 1156 7

Title 28 U. S. C. A., Sect. 344 7
Title 18, U. S. C. A. 189-195 14

JUDICIAL ETHICS.

No. 15 6
16 6
18 6
19 6
20 6
21 6
22 6
34 6
36 6

CONTENTS OF BRIEF.

	PAGE
Statement of Questions Involved	1
Answer on Motion to Dismiss Appeal and to Dismiss Petition for Certification, based upon Brief and Appendix I, II, III	2
Statement of Facts, etc.	4
Appellants Memorandum	8
Appearances	8
Argument	9
Points I and II. The Court should have dismissed the complaint of the plaintiff, because the work was done by an Independent Contractor	9
Point III. The Court should have dismissed the complaint against the weight of the evidence	10
Point IV. The Court created prejudice against the defendant by failing to make Pressie Squire a co-defendant and by asking John J. Malanga of counsel for Ex Judge Pellegrino (Jimmie) Pellecchia to demand a motion to nonsuit the plaintiff as against the co-defendant Jerry Fiore	14
Point V. The Court should have nonsuited the plaintiff because Pressie Squire acted as an Independent Contractor	20
Point VI. The Court should have dismissed the action based on the contradiction of its own witnesses	21

PAGE

Point VII. The Court should have disqualified the testimony of plaintiff's sisters, because they were self-serving, for his benefit 22

Point VIII. The Court should have granted the motions demanded by the defendant and charged the jury as requested 23

Point IX. The Court failed to explain to the jury the meaning, and the responsibility of the Independent Contractor .. 24

Point X. The Court should have instructed the jury to reconsider the verdict for the amount of $2,000.00 as excessive 25

Point XI. The Court should have granted a new trial, based on the newly discovered evidence 26

Point XII. The Court had enough new evidence to grant a new trial 27

Point XIII. The Court should have granted a trial *de novo* as applied by defendant 28

Point XIV. The Court had sufficient new material which was meritorious, to grant a new trial 28

Point XV. Judge Joseph Conlon should not have instituted any contempt against the defendant, because said defendant has a legal right to apply for a new trial based on newly discovered evidence, which were meritorious, and he was disqualified to preside as Judge, because he was the accuser through his *amicus curiae* John A. Laird 31

PAGE

Point XVI. The presiding Judge and his *amicus curiae* by their acts, by operation of law, made themselves contemptuous 32

Point XVII. The Court should have held Jerry Volpe in contempt for his perjurious testimony 34

Point XVIII. The Court should have held in contempt, Jerry Volpe, the plaintiff, and his attorneys 35

Point XIX. The Court should have held in contempt Anthony Volpe 36

Point XX. The Court should not have incited his *amicus curiae* to investigate, or to annoy the witnesses, except to cross examine them in open Court, and in the actual presence of the defendant 40

Point XXI. The Court again failed to hold Jerry Volpe as a perjurer 42

Point XXII. The testimony of Henry Stabile should have been sufficient for the Court to exonerate the defendant, and dismiss the contempt proceedings, and on account that the Court cannot hold any one on mere suspicion, because the jury is the sole judge of all facts, and for the reason that the contempt was neither criminal, nor civil, since the interest and remedies is only between as the plaintiff, and the defendant-appellant 43

Conclusion 54

Citations.

	PAGE
Sarno v. *Gulf Refining Co.*, 99 N. J. L. 340..	10

Rules.

1:2-1	3
1:5-2	3
1:5-4	4
1:5-5	4
2:8-1	1, 7
2:8-2	1, 6, 7, 8, 54
2:8-3	7, 54
2:9-1	7
2:9-2	7
2:9-3	7
2:12-3	3
2:20-5	7
3:10-4	7
3:80-1	7
3:80-2	7

Statutes.

R. S. 2:15-1	7
R. S. 2:15-7-8	7
R. S. 2:27-243	10
R. S. 2:27-348-352-355	10

Text.

Corpus Juris Secundum, p. 8, Contempt...	57

CONTENTS OF APPENDIX.

	PAGE
APPENDIX I	1a
Letter to Judge Joseph E. Conlon	1a
Answer and Jurat	3a
Petition and Jurat	9a
Rule to Show Cause	12a
Affidavit of Pasquale Martino	13a
Affidavit of Henry Stabile	14a
Affidavit of Louis Bourget	16a
Affidavit of Henry Stabile	17a
Affidavit of Jerry Volpe	18a
Letter from Anthony Volpe	19a
APPENDIX II	20a
Affidavit of Jerry Volpe and Ann Volpe	20a
Affidavit of Henry Stabile	21a
Affidavit of Pasquale Martino	22a
Affidavit of Mrs. Antoinette O'Rouke	24a
Affidavit of Anthony Volpe	25a
Notice of Appeal	26a
Petition and Jurat	27a
Affidavit of Louis Bourget	29a
Notice of Appeal	31a
Sentence	32a

PAGE

APPENDIX III 33a

Notice of Motion by John A. Laird..... 33a

Affidavit of John A. Laird..... 34a

Brief of Appellant by Salvatore Muscato, Attorney for Defendant-Appellant; Eugene A. Liotta, of Counsel.... 36a

Statement of Questions Involved..... 37a

Statement of Facts 38a

Argument

Point I. Should a judgment of conviction for contempt be sustained in a proceeding wherein the offense was not committed in the presence of the court 39a

Point II. Can the court in a civil proceeding deprive a defendant charged with the commission of subordination of perjury be convicted without indictment and without trial by jury, and the court should have assigned counsel to assist the defendant in his defense 42a

Affidavit of Eugene A Liotta..... 44a

Order Dismissing Appeal 45a

Mandate on Dismissal 46a

Bench Warrant 47a

Notice of Appeal 48a

Letter to Hon. Nathan Jacobs, Judge of A. D. 50a

Notice of Appeal 51a

PAGE

Affidavit of William R. Mestice..... 52a

Notice of Petition for Certification..... 53a

Petition for Certification 54a

Opinion 57a

Notice of Motion 59a

Petition—On Appeal from Order of Essex County Court 61a

Supreme Court of the United States

WILLIAM R. MESTICE, Petitioner, *vs.* ANTHONY MASI, Respondent.	Petition for Writ of Certiorari.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE YOUR HONORS:

Comes now William R. Mestice, a citizen of the United States and State of New Jersey, and respectfully petitions this Honorable Court to grant a Writ of Certiorari to review the opinion and judgment of the Supreme Court of New Jersey, and of its relative Courts below, rendered and entered on the 19th day of December, 1949, Docket Nos. 371; 431; and Docket Nos. 12365/302/4; 12322/294/4, of the Superior Court of New Jersey, Appellate Division; and Dockets 84192; 90524 of the Essex County Court of New Jersey, entitled as Anthony Masi, Versus William R. Mestice.

Opinion of the Court Below.

The opinion and orders in this cause, is entitled Anthony Masi Plaintiff-Respondent, Vs. William R. Mestice Defendant-Appellant, appears in the Certified Records and "Annexed Appendix" and reported in 4 N. J. Super. 492, 67 A. 2nd 692.

Summary Statement of the Matters Involved.

1. This action was commenced by the above said plaintiff Anthony Masi in the former Essex County Court of Common Pleas, in the City of Newark, County of Essex, State of New Jersey, where a judgment for $2,000.00 was rendered in favor of the said plaintiff, and against the petitioner, William R. Mestice.

2. The petitioner, soon thereafter, made an application for a new trial, based on newly discovered evidence, which material facts were meritorious, but the plaintiff's attorneys of record, introduced to the Court, false counter affidavits, which were never submitted, nor served upon the petitioner, for the reason whereof said application was denied, whereupon

3. The petitioner served with a notice of appeal upon the said attorneys of record, a supersedeas bond was duly provided, and a stay of execution on the judgment was granted by the trial judge, who being infuriated, then and there, ordered an investigation of the affiants through a special appointed *Amicus Curiae, and* a detective of the Prosecutor's Office, and summarily, in order to destroy the appellant's newly discovered evidence, held the petitioner in criminal contempt, and imposed upon him a severe sentence, sinisterly, in an attempt to abscond his bias, and irregularities committed in the course of the trial hearing.

4. There was no formal indictment, no jury trial, no assistance of an attorney, no time for preparation for a defense, and notwithstanding that there was not a scintilla of evidence against the petitioner, still he said to been suspicious of an affiant's affidavit, which he deemed to been false, and thereby he inflicted upon the petitioner Six (6) months in the Caldwell Penitentiary, in the County of Essex, State of New Jersey, or at Three (3) months and $1,000.00 fine, with Three (3) months suspension; and al-

though a bail of $2,500.00 had been filed, and Notice of Appeal was submitted to him, then and there, his prayers were denied for an opportunity to be heard before the Superior Court of New Jersey, on the ground that he had no jurisdiction in the above matters, that his sentence was extrajudicial, and that he was disqualified to preside as Judge, and that since the facts were meritorious, and been presented to the Court in good faith, and in a respectable manner, and to protect my legal and equitable rights as against the above said plaintiff, and since that an application for a new trial was legally presented to the Court, the facts involved by both parties, were to be adjudged by a duly impaneled Jury, and not by the said Judge, nor by his *Amicus Curiae,* and neither by a detective of the Prosecutor's Office, who have acted maliciously to the detriment of the herein petitioner.

5. The petitioner, finally, was successful to contact with an attorney, and obtained a release from the aforesaid institution in order to prosecute the said appeal before the said Superior Court of New Jersey, whereby the *Amicus Curiae* submitted a substantially false affidavit to the said Court, and said Court dismissed the appeal for lack of prosecution where in fact further deposition were already been taken, and briefs had been submitted by both parties to the said Court, and which dismissal was the cause for the issuance of a Mandate, Bench Warrant, while the petitioner's attorney of record had gone to Florida to recover his health, and without notice the petitioner was re-apprehended, notwithstanding the fact that "Notice of Appeal" was filed with the said Court, and a copy thereof been served upon the said *Amicus Curiae.*

6. That the Superior Court, thereafter, has rendered an Opinion in the Civil Action, confirming the judgment of the Court below, whereupon the petitioner has filed both appeals before the Supreme Court of New Jersey, who without giving any kind of reasonable ground for their dis-

position in the aforesaid matters, have dismissed my prayers with costs, and, in the meantime the Essex County Court, while the appeals were pending in said Supreme Court, and Supersedeas Bond had been filed, and approved, and a stay of execution had been entered by the said Superior Court, vacated the stay of execution signed by the trial judge and permitted the plaintiff's attorneys of record to sell my real estate of an approximate value of $60,000.00 for the nominal sum of $800.00 to the office secretary of the said attorneys, in order to conceal their fraudulent conveyance, and which estate consists of Two (2) brick buildings, one of Nine (9) families, and the other of Sixteen (16) families, with an income of $800.00 per month, and which "Petition" for appeal has also been dismissed by the said Supreme Court of New Jersey without giving the least consideration, and in like manner a Supersedeas Bond, and an order for the setting aside of proceedings pending the proceedings before this Honorable Court, has also been denied.

WHEREFORE, the petitioner prays that a Writ of Certiorari may be issued by this Honorable Court, and it may be made to operate as a supersedeas—a Supersedeas Bond being already submitted with this Court, and which it may be approved—and it may be made to suspend the effects of the judgments of the Courts below of New Jersey, during the pendency of proceedings in this Honorable Court, and the review thereof, and that all proceedings of record, with all papers and exhibits, upon which judgments were rendered, duly certified be subpoenaed to this Court, namely Supreme Court of The United States, to the end that the said judgments may be reversed, and for nothing holden, that the petitioner's name be cleared and honored as to his legal rights and privileges, that his real estate may be restored unto him, and the attorneys of record, or its secretary—one Doris Newman—may be enjoined from any rents which has been derived, or that it come out from the petitioner's estate, and that in like manner, the surety

bondsmen, named in the "Supersedeas Bond" are not to be held liable until the final disposition of proceedings in this Honorable Court, and the said Honorable Court may award, or may direct to impanel a jury to assess damages in favor of the petitioner, together with costs, and disbursements to be assessed.

And the petitioner will forever pray, etc.,

Dated: January Ninth, 1950.

Respectfully submitted,

WILLIAM R. MESTICE,
William R. Mestice,
247 Broadway,
Newark, New Jersey.

Ruling of the Supreme Court of New Jersey.

1. In deciding the due process clause of the Fourteenth Amendment of the United States Constitution, and the New Jersey Statutory provisions of Article I, of Rights and Privileges, Nos. 8, 9, 10, 11, 12; and the Rules of Practice 2:8-1; 2:8-2, a, d, e; 2:8-3; 2:9-1, a; 2:9-2; 2:9-3; 2:9-5; 2:15-7-8; 3:10-4; 2:15-1; 3:80-1; 3:80-2, d; 3:80-3; and the following canons of Judicial Ethics: Nos. 15, 16, 18, 19, 20, 21, 22, 34, 36 thereof, the Supreme Court has declined to make any comments, and has dismissed the applications with costs and in likewise manner has dismissed the appeal of the civil action and has declined to make comments as to petitioner's property by dismissing the appeal with cost, and thus has legalized the fraudulent conveyance in favor of plaintiff's attorneys of record in the name of its office secretary—one Doris Newman.

2. That the Statutory Provision of the State of New Jersey, it renders as final all judgments rendered by the said Court, under Article VI, of New Jersey Constitution, Section II, Chapter 2 thereof.

3. The R. S. 2:15-7-8 which stautory provision consist in that where one is convicted of contempt the fine should not exceed the sum of $50.00, and the offender may be held until he pays the fine. The said Supreme Court of New Jersey has declined to render an opinion, presumably, to suppress the petitioner's innocence in order to avoid or to prevent disciplinary measures as against the trial judge, with his *Amicus Curiae*, the attorneys for the plaintiff, and as against the Deputy Sheriff, who has cooperated in the said fraudulent conveyance to the detriment of the petitioner for the nominal sum of $800.00, and which buildings could not been rebuilt for not less than $200,000.00

As to Jurisdiction of this Honorable Court.

1. The Jurisdiction of this Honorable Court is based upon Section 237 (b) of the Judicial Code, 36 Sta. 1156, as amended by Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937, Title 28, U. S. C. A. Sec. 344 (b), providing for review by this Court, by certiorari, of final judgments in the highest Court of a State in which a decision could be had, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or any treaty, or statute of the United States, where the Federal claim is sustained, as well it is denied.

2. The judgments of the Supreme Court of New Jersey, here sought (1) *to be reviewed* as against the above respondent, was entered in the former Essex County Court of Common Pleas, now known as the Essex County Court, on the 20th day of November, 1947, affirmed in the Superior Court of New Jersey—Appellate Division—on July 11th, 1949, and dismissed by the Supreme Court of New Jersey, on the 19th day of December, 1949. The contempt proceeding against petitioner (2) *to be reviewed* was rendered on June 11th, 1948 in the aforesaid Court, by the same trial Judge, which appeal was dismissed by the said Superior Court for lack of prosecution on the 24th day of December, 1948, and application dismissed on the 19th day of December, 1949. The fraudulent conveyance of petitioner's property (3) *to be reviewed* was made by Sheriff's Deed on the 10th day of November, 1949, and application to the Supreme Court of New Jersey was dismissed with costs on the 19th day of December, 1949.

3. The Supreme Court of New Jersey has ignored, or tacitly, has refused to apply disciplinary measures against the Judge, or Judges of the Courts below, and those responsible for the mal administration of justice as against the petitioner to avoid a repetition of a judiciary scandal in New Jersey—recently made by James Pellegrino Pellec-

chia, ex Police Court Judge of Newark, a self confessed embezzler of the defunct Columbus Trust Company of Newark, New Jersey, and who was the attorney for the codefendant in this case, and which trial Judge non suited to the detriment and prejudice of the petitioner, before evidence could be submitted to the Court, thus making said codefendant as an independent contractor with another, and the said trial Judge sustained his own objection, which is a prejudicial, reversible error.

4. The jurisdiction of this Honorable Court is invoked for the reason that there has been no "due process" as to proceedings, nor as to sentence inflicted upon the petitioner, nor as to fine imposed, nor as to the fraudulent conveyance of petitioner's real estate, while the proceedings were still in the Supreme Court of New Jersey, while a Supersedeas Bond had been approved, and filed, an a stay of execution was had before the Superior Court, still the Court below gave an *Ex Parte* Order to the plaintiff's attorneys and vacated the stay of execution, and the fraudulent conveyance disregarding any principle of "due process", and which it is repugnant to the laws of the State of New Jersey, and the Federal Constitution of the Fourteenth Amendment, Section 1, thereof, and as to Articles IV, V, VI, VIII, of our Constitution.

5. The following cases may be considered by this Honorable Court to sustain the jurisdiction by the United States Supreme Court over the Supreme Court of New Jersey: In

1887: *Davidson* vs. *City of Orleans,* 96 U. S. 97, 24 L. Ed. 616,

> "The Fourteenth Amendment, U. S. Const. A State law depriviing a citizen of his property must provide not only some process of law but due process of law." And in

1855: *Murray* vs. *Hoboken Land & Improvement Co.*, 59 U. S. 272, 18 Howard 272, 15 L. Ed. 372, U. S. N. J.

"The words 'due process of law' are intended to convey the same meaning of the words 'by the Law of the land' in Magna Charta. Den ex Dem." And in

1899: *Charles* vs. *City of Marion*, 98 F. 166.

"It is essential to due process of law that there shall not only be notice of time and place for a hearing but, what is more important, that there shall be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved." And in

1904: *C. C. Ala. U. S.* vs. *Moore*, 129 F. 630.

"The Fourteenth Amendment of the Federal Constitution, U. S. C. A. which prohibits a State from depriving any person of life, liberty, or property without due process of law, adds nothing to the rights of any citizen against another but merely furnishes additional guarantees on the fundamental rights which belong to every citizen as a member of society." And in

1909: *Risley* vs. *City of Utica*, 173 F. 502, C. C. N. Y.

"The provision that no State shall deprive any person of life, liberty, or property without 'due process of law', refers to and includes all the instrumentalities of the State, to its legislative, judicial, and executive authorities; and whoever by virtue of public position under the State deprives another of any right protected, by that Amendment, violates its inhibition, and his act is that of the State." And in

1911: *C. C. N. Y., U. S.* vs. *Billings*, 190 F. 359, modified *Billings* vs. *U. S.*, 34 S. Ct. 421, 232 U. S. 261, 232 U. S. 310, 58 L. d. 617,

" 'Due process of Law' guaranteed in both the 5th and the Fourteenth Amendments to the Constitution U. S. C. A. means the Law of the Land. The guaranty implies the Administration of Equal Laws according to established rules by competent tribunals having jurisdiction and proceeding upon notice, and hearing." And so in *Yount's Case,* 267 F. 861, etc. In *Campbell* vs. *Gormley,* 104 So. E. 177, 185 Ga. 65, Code 1933, Ph. 24-105,

"The mere filing and presentation of pleadings for purpose of vexation or delay, do not generally constitute 'contempt of Court', unless they are presented in contemptuous, or disrespectful manner, or contain matter which of itself constitute contempt." *Judicial Code, Act,* March 3, 1911, C. 231, Ph. 268, 36 Stat. 1163, 28 U. S. C. A. Ph. 385,

"The Courts shall have the power to punish contempts of their authority, provided that such power shall not be construed to extend to any cases." And in

1921: *U. S. Del. Ownbey* vs. *Morgan,* 41 S. Ct. 433, 256 U. S. 94, 65 E. Ld. 837, 17 A. L. R. 873, affirming 1919, 105 A. 837, 7 Boyce 297,

"The due process clause of the Fourteenth Amendment U. S. C. A. Constitution restrains State action, whether legislative, executive, or judicial within bounds that are consistent with the fundamentals of individual liberty and private property including the right to be heard where liberty or property is at stake in judicial proceedings."

1935: *U. S. Cal. Mooney* vs. *Holohan,* 55 U. S. Ct. 340, 294 U. S. 103, 79 L. Ed. 791, Rehearing denied, *Ex Parte Rooney* 558 Ct. 511, 294 U. S. 732, 79 E. Ld. 1261,

"Requirement of 'due process' is not satisfied by mere notice and hearing if State, through prosecut-

ing officers, acting on State's behalf, has contrived conviction through pretense of trial which in truth is used as a means of depriving defendant of liberty through deliberate deception of Court and Jury by presentation of testimony known to be perjured, and in such case State's failure to afford corrective judicial process to remedy the wrong when discovered by reasonable diligence would constitute deprivation of liberty without due process, U. S. A. C. Amend. 14.

6. The trial Judge of the Court below has submitted to the Supreme Court the transcript of record with a certificate attached thereto, which states to be a complete record, and it further states that the petitioner to be an attorney at law of the State of New Jersey, which statements are false and prejudicial to the detriment of the petitioner, and against U. S. C. A. Title 18 Ph. 189, and T. 18 Ph. 195, in violation whereof it has contributed to the prejudice of the petitioner, and in like manner the *Amicus Curiae*, the plaintiff's attorneys, and the Deputy Sheriff may be deemed to have offended the said Statutory Provision.

Questions Presented.

1. May the petitioner be heard before the Supreme Court of the United States in order to protect his legal and equitable rights as provided by the New Jersey Constitution, and by the United States Constitution?

2. May the petitioner have equal protection of the Laws as made and provided by the Legislature of New Jersey, and in violation whereof, may the petitioner invoke the jurisdiction of the Supreme Court of The United States, under the "Due Process" clause of the Fourteenth Amendment, Section 1, thereof, and as to Articles IV, V, VI, and VIII of our Constitution?

3. May a defendant, in a suit for damages, make application for a trial *de novo* based on newly discovered evidence, without incurring despotic control, and domination by a presiding Judge, especially where a defendant, acting in good faith, introduces newly discovered evidence, which facts are substantially meritorious?

4. Was the trial Judge qualified to preside over the criminal contempt, of which he was the accuser as against the petitioner, and of his own choice, summarily, assisted by his *Amicus Curiae,* by a detective, and without a Jury, and without the assistance of an attorney for the defendant, and without giving the said defendant an oportunity to prepare for a defense?

5. The Rules of Practice of New Jersey, 2:8-2 says: "(a) a criminal contempt must be prosecuted in the cause in which it occurs * * * allowing a reasonable time for the preparation of the defense * * *.

(d) If the person charged with contempt involves disrespect to or criticism of a Judge, that Judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt. If the substance of the charge is a violation of an order or judgment of the Court, the Judge who made the order or judgment is likewise DISQUALIFIED.

(e) Where an order to show cause is made, the person charged with contempt, the person charged with contempt may, not later than 1 day before the return day of the order, serve an answer or an answering affidavit * * *. Interrogatories are not required."

In this case the petitioner was not given an opportunity to file, nor to answer any interrogatories, and no time was given to submit to the Court an answer, nor an answering affidavit, but protested in that the Court, nor the trial Judge had any jurisdiction in the matter on the ground

that there was an appeal with the Supreme Court of New Jersey, and that for the reason whereof the trial Judge's accusation was then and there an abuse of authority, or power without precedence, and for then, and as *per diem*, the contempt was neither criminal, nor civil in nature, since the plaintiff said to been hurt before the defendant's premises, while the newly discovered evidence tended to prove, and did substantially prove that the plaintiff had fallen a half block away from the said defendant's property, and the police record manifestly demonstrates that he had fallen in some unknown manner, presumably at * * * etc. Therefore, these are purely questions of facts which had to be decided by an impanelled Jury, and not summarily by the trial Judge, nor by his *Amicus Curiae*, and not by a detective.

WHEREFORE, upon consideration of the above stated facts, and upon the Rules of Practice of New Jersey, was the trial Judge qualified, or disqualified to preside as Judge of the facts involved in the affiant's affidavit? And without a Jury? And without the assistance of a counsel? And without any reasonable time for his preparation for a defense? Query: If A accuses B of rape against C—his daughter—and A presides summarily as Judge, what decision would A render, or inflict against B, the presumed raper of his daughter, C?

5. May the petitioner invoke the "due process clause" of the Fourteenth Amendment of the Federal Constitution in violation of due process in the Courts of New Jersey, and in violation of the rights and privileges set forth in the new Constitution of New Jersey as to Article I, Chapter 8, 9, 10, 11, 12, thereof?

6. Where one has been subjected to a malicious prosecution, and a wantoned persecution, and suffered in deprivation of liberty, with an imposition of an excessive fine, together with loss of health, humiliation, and mental an-

guish, and tried in a mockery procedure, and without the inalienable right of trial by Jury, at the hand of an infuriated Judge, assisted by an *Amicus Curiae,* and a detective for the purpose to coerce from the affiants stultified versions of meritorious facts so that they could carry through their premeditated designs, may the petitioner invoke the jurisdiction of this Honorable Court, in respect to the said "due process clause" of the Fourteenth Amendment, and to the Articles IV, V, VI, VIII, of the Federal Constitution of the United States?

7. May the petitioner invoke the jurisdiction of this Honorable Court where his real estate has been sold in spite of a Supersedeas Bond being filed with the proper authorities, and a copy thereof being served upon the attorneys of record, and to the Sheriff's Office and a fraudulent conveyance being perpetrated; and may this Court apply U. S. C. A. Title 18 Ph. 189-195 where said real estate has been inequitably sold, and in violation of the laws so made and provided in the sale at auction, of real estate?

8. Where a Judge, *et als.* have abused of their authority and have offended or are in violation of Canons of Ethics of the American Bar Association and Statutory Laws, and the offender, or the offenders have willfully and wantonly abused of their authority, may this Court apply disciplinary measures against the mal administration of justice?

9. May the petitioner invoke the jurisdiction of this Honorable Court to vacate a fraudulent conveyance of his real estate while an appeal was pending in the Supreme Court of New Jersey, a Supersedeas Bond was already approved and filed, and a Judge of a Court below vacates a stay of execution, and without complying as to rules governing such a conveyance, permits, or connives thereto in the mockery sale thereof to a very low nominal sum to the detriment of the petitioner?

10. Where the Courts of the State of New Jersey refuses, or tacitly ignores, or disregards the prayers of a petitioner who in good faith submits affidavits which he verily believes them to be true, and the Judge or Judges thereof, answer evasively, or dismisses without any reasons, or grounds, or suppressess issues capriciously, summarily, or without a sound justification, and without authority, may the petitioner, who has been subjected to such abuses invoke the jurisdiction of this Honorable Court, based on the "due process clause", and the "Laws of the Land?"

Reasons Relied on for Granting the Writ.

1. The Supreme Court of New Jersey has ignored, and has dismissed intentionally, or erroneously, the petitioner's prayers in the above matters.

2. The Supreme Court of New Jersey, and its Courts below have denied any legal or equitable relief to the petitioner, which is in violation of "due process" and as to the rights and privileges of the New Jersey Constitution, and which failure of due process is repugnant to the constitution of New Jersey, and more indignant to the "Laws of Our Land."

3. The petitioner has exhausted all of remedies which could been petitioned, or prayed in the Courts of New Jersey, for the reason whereof the above petitioner submits to this Honorable Supreme Court of New Jersey the following:

Prayers.

1. That the judgment of the Courts of New Jersey in favor of the plaintiff Anthony Masi, and against the petitioner, William R. Mestice, may be reversed with costs and disbursements made by the petitioner.

2. That this Honorable Court may vacate, set aside, and completely exonerate the petitioner of the criminal accusations, and proceedings as manufactured by the presiding Judge of the Essex County Court, and His *Amicus Curiae, et als.*, and as to conviction, and as to the sentence imposition, and records of fine and incarceration be expunged from the files, and to honorably restore unto him all legal rights and privileges.

3. That the illegal disposition of the real property, of the petitioner, which it has been sold, to the office secretary of the attorneys of record for the plainiff, Anthony Masi, for the sum of $500.00 on one brick building consisting of Nine (9) families, recently remodernized, which it has a value of about $30,000.00, and of another brick building which consists of 16 families, having a marketable value of about $30,000.00 was sold for $300.00, and both buildings having a rental income of $800.00 per month, may be restored to the said petitioner.

4. That a judgment against the bonds men to the sum of $2,700.00, or thereabout be set aside, vacated, and for nothing holden, which the attorneys for the plaintiff have illegally and fraudulently secured with the assistance of the Mal Administrators of Justice in the Courts below of New Jersey, and ignored in the Court of Last Resort of the State of New Jersey, which said surety bondsmen are the same parties who signed the aforesaid "Supersedeas Bonds" had been duly approved, and filed with the said Courts of New Jersey, and copies thereof had been duly served upon all the attorneys concerned, including the *Amicus Curiae*, and the Deputy Sheriff who has contrived in the fraudulent conveyance of petitioner's property, heretofore set forth.

5. That the "Supersedeas Bond" which has been filed with, or been submitted to this Honorable Court, is a facsimile with the one which has been submitted and filed with

the Supreme Court of New Jersey, and the same parties, being the same bondsmen of the "Supersedeas Bonds" which have been, or taken the responsibility of suretyship in the above matters, and for the reason whereof, since the proceedings in the above matters are invoked in the Jurisdiction of this Honorable Court, and since the proceedings against the said bondsmen have been prematurely instituted, said judgments of the said Court below, and its execution may be dismissed, set aside, and for nothing holden.

6. That the properties of the petitioner, of which he has been deprived, and which have a marketable valuation of about $60,000.00, the same may be rebuilt in the proximity of, or over than $200,000.00, for the reason whereof, this Honorable Court may award damages to the petitioner, or may direct to impanel a Jury to assess damages, together with costs in the above matters, and disbursements made therefor.

And the petitioner may have such other relief as this Honorable Court may deem appropriate in accordance to the enacted "Laws of The Land."

And the petitioner will for ever pray, etc., and that the Writ of Certiorari may be issued, as prayed therefor.

Respectfully submitted,

William R. Mestice,
247 Broadway,
Newark, New Jersey.

Dated: January Ninth, 1950.

Specification of Errors to be Urged.

The above petitioner—William R. Mestice—in connection with his "Petition For Writ of Certiorari," urges the following errors which he avers to have occurred in the proceedings and upon the trial hearings of the above causes, to wit:

I. The Court erred in its failure to dismiss the above action on the ground that it failed to state that the plaintiff was free from contributory negligence, and that the defendant had engaged one Pressie Squire as an independent contractor, and a co-defendant one Jerry Fiore, and the latter became non-suited at the request of the presiding Judge, before the appellant could have produced to the Court conclusive evidence which would have made him a co-responsible as independent contractor with the said Pressie Squire, and which presiding Judge objected, and then and there sustained his own objection.

II. The presiding Judge erred in his failure to grant an adjournment of the trial hearing so that he could have provided for a competent trial attorney within a few weeks, for the cause whereof a number of conscientious jury-men refused to take jury seats.

III. The presiding Judge erred in its failure to non-suit the plaintiff on the ground that the evidence was insufficient, false, and contradictory as to the plaintiff, his witnesses, and as to the police record.

IV. The presiding Judge erred in passing remarks in the course of the trial, which were prejudicial to the petitioner, and more specifically set forth in the Brief and Appendix which was submitted to the Superior Court—Appellate Division—of New Jersey, in Point 1, thereof.

V. The Court erred in its failure to present to the Jury all of the material factual issues for its consideration, and

committed thereby a reversible error, which it is more specifically set forth in Point II of the said Brief and Appendix.

VI. The Court erred in its failure to take a nominal short time to consider the charges as requested by the petitioner for the sake of fair administration of justice, which abuses failed to instruct the Jury properly on the theory of contributory negligence, intervening cause, the "but for rule" more specifically set forth in the said Brief and Appendix.

VII. The Court erred in its refusal to grant a new trial to the petitioner, based on meritorious newly discovered evidence, more particularly set forth in Point XI on the Brief, and "Appeal on Orders From The Essex County By Petition, Etc."

VIII. The Court erred in refusing a trial *de novo* to the petitioner based on additional newly discovered evidence more particularly set forth in Point XII, XIII, XIV, by the refusal whereof a Notice of Appeal was duly filed, and a copy thereof served upon the plaintiff's attorney, and a "Supersedeas Bond" approved and filed.

IX. The presiding Judge, irritated, capriciously ordered an investigation of all of the affiants by appointing an *Amicus Curiae* and a detective of the Prosecutor's Office, and in order to destroy and suppress the said newly discovered evidence, which were meritorious and submitted to the Clerk of the Court in good faith, said affiants' affidavits erred in accusing the petitioner and maliciously held contempt proceedings against the petitioner with the assistance of his *Amicus Curiae,* which criminal contempt proceeding was extra-judicial and unauthorized by operation of law, in that (1) it being that an appeal had been already made, and (2) it being that he was the accuser, and (3) it since that the Rules of Practice of New Jersey 2:8-2 (d), he was legally disqualified as presiding Judge; and (4) it being that the application for a trial *de novo* had

been legally made, and in good faith; and (5) it being that no contempt had been committed in the actual presence of the Court; and (6) it being that all papers were submitted to the Court's Clerk in a legal and respectable manner; and (7) it being that the interest was at stake as between the petitioner and the respondent, and no third party, or the public of the State would in any way been affected, and, therefore, (8) it being that the contempt was neither a criminal nor a civil one, his (9) contempt proceedings presented a persecution which it has no precedence in the annals of administrative justice, and its persecution is particularly described in Point XV, of the said Brief and Appendix.

X. The Court erred in its abusive trial hearing as against the petitioner (1) by failing to give any time sufficient to procure a defense for the contempt accusation made by the said presiding Judge, and his *Amicus Curiae,* and with the assistance of their detective, and the Court erred (2) in failing to provide an attorney for the petitioner; and the presiding Judge abused of his authority for (3) his failure to have a formal indictment as against the petitioner, and it was more abusive on his part for (4) his failure to impanel an impartial Jury to judge as to the meritorious factual evidence as presented by the affiants in the aforesaid affidavits, and as to guilt or innocence of the petitioner, which is referred to Point XVI.

XI. The Court erred in its failure to hold in contempt its *Amicus Curiae,* and its detective for having induced some of the affiants to testify falsely to the detriment of the petitioner, and the presiding judge was fully aware of their perjurious testimony, which it is more particularly specified in Point XVII, XVIII, and XIX of the said Supplement Brief and Appendix.

XII. The presiding Judge erred and abused of his authority by inciting his appointed *Amicus Curiae* to annoy and to intimidate by means of investigation, the affiants, when he had ample opportunity to cross examine them in

open Court, and in the presence of the petitioner, and which abusive tactics are more particularly set forth in Point XX, XXI, of the said Brief and Appendix.

XIII. The Court erred in its failure to dismiss the contempt and to exonerate the petitioner when the testimony of Henry Stabile was sufficient in proving to the satisfaction of the Court that the petitioner had been accused wrongfully, and then and there the presiding Judge abused of his authority maliciously, and based his prosecution as against the defendant on mere suspicion in order to destroy and suppress the newly discovered evidence, and which facts were to be decided by an impartial Jury and not by the said Judge, nor by his *Amicus Curiae,* and neither by a detective; and which abuses are particularly set forth in the said Brief and Appendix, Point XXII and in the "Conclusion" thereof.

XIV. The presiding Judge erred with malice by inflicting a severe sentence against the petitioner upon suspicion of one of the affiants, whose testimony he attempted to corrupt in vain, and with the assistance of his *Amicus Curiae,* he carried out his deliberate and premeditated design to crucify the petitioner illegally, extra judicially and without a jury.

XV. The presiding Judge abused of authority by refusing the petitioner a stay of execution, notwithstanding the fact that a security bond had already been filed and the Notice of Appeal had been filed with the Court.

XVI. The Superior Court, Appellate Division—abusively erred in dismissing the appeal for lack of prosecution on the part of my attorneys, where in fact Briefs had been submitted to the Court, and the answering briefs had been served upon my former attorney and the same *Amicus Curiae* had submitted an affidavit to the Court which was substantially false and perjurious, a Mandate was then and there provided, a Bench Warrant was promptly issued

by the same Judge of the Court below so that their ultimate criminal design could have been culminated by the said Judge and His *Amicus Curiae,* while my said attorney of record had gone to Florida for his health, of which the Court was conscious thereof, and notwithstanding that a Notice of Appeal from the said Appellate Division had been taken to the Supreme Court of New Jersey, and a bond had been filed for the purpose thereof, and said Notice of Appeal had been served with the said *Amicus Curiae,* still the petitioner was subjected to deprivation of liberty without "due process" which is repugnant to the laws of the Constitution of New Jersey, and of the United States Constitution.

XVI. That the said Appellate Division erred in reaffirming the decision of the lower Court as to the false, and fraudulent claim of the above respondent, more particularly set forth in the affidavits of the affiants, and as set in the Briefs of the petitioner, and which judgment of $2,000.00 is against the weight of evidence, and of untold irregularities, and bias, and prejudicial remarks committed by the said presiding Judge of the Court below.

XVII. The Supreme Court erred by refusing the petitioner an extension of time so that further depositions could been taken in the above matters, and so that briefs could been submitted to the said Court, and it further erred in denying the petitioner a stay of execution pending said appeals.

XVIII. The Court below erred by denying the petitioner a stay of execution pending the Petition for Certification in the above matters before the Supreme Court, which has been made a part of the Appendix, and which the Supreme Court has dismissed with costs erroneously, and to detriment of the petitioner.

XIX. The Court below erred in denying the petitioner the said stay of execution, and at the same time has failed to suppress the respondent's attorneys to obtain from the

Sheriff's Clerk a false, illegal sale of the petitioner's real estate, to the office secretary of the said attorneys of record for the above respondent, for their personal benefit, without giving advertising publication as required by law of the State of New Jersey, and of the United States Constitution, and repugnant to the "due process" clause.

XX. The Supreme Court of New Jersey erred by failing to make an investigation of the contemptuous Mal Administration of Justice as practiced by the Courts below, and its Sheriff office mal practice, and the mal practice of the attorneys of record for the plaintiff, of the mal practice of the *Amicus Curiae,* and the mal practice of the Administrator of Justice of the Courts below, who notwithstanding that the petitioner has been subjected to all kinds of abuses, and humiliations, they have wrongfully, and illegally taken fraudulently the petitioner's real estate of approximately $60,000.00 valuation, consisting of a brick building of nine (9) families, recently remodernized, for $500.00, and another brick building of sixteen (16) families, partly remodernized, for the sum of $300.00, and the said Supreme Court of New Jersey has dismissed the said "Petition" On Appeal From Orders of Essex County Court on December 19th, 1949, with costs, and upon application of the said attorneys of record, whose Brief for Dismissal of Appeal, and Petition for Certification was granted before the appellant could have interposed an answer thereto, within the time prescribed by the Rules of Practice of New Jersey.

WHEREFORE, the petitioner prays that the Judgments of the Courts below, and the orders of the Supreme Court of New Jersey may be reversed.

WILLIAM R. MESTICE,
William R. Mestice, *Pro Se.*,
314 Waverly Avenue,
Newark, New Jersey.

Dated: January Ninth, 1950.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Questions Involved.

1. Should the appellant be entitled to be heard before the Supreme Court of New Jersey, in order to protect his legal, and equitable rights, as provided by the New Jersey Constitution, and by the United States Constitution, and according to its established rules, and fundamental laws?
2. Can the appellant have equal protection of the laws, so made and provided by the Legislature, and by past decisions rendered in *consimili casu*?
3. Can the appellant make applications for trial *de novo*, based on newly discovered evidence, without incurring despotic control, or domination by a presiding judge.
4. Was the trial Judge legally qualified to preside in a contempt proceeding according to Rules 2:8-1 and 2:8-2?
5. If a Judge abuses of his authority, and an *amicus curiae* is conscious of said abuses, etc., is the former or the latter, or both of them in violation of the Administration of Justice?
6. If one is, or has been persecuted illegally, will the Mal Administrators of Justice be severally admonished, and disciplinary measures applied against them?
7. Can an appellant, in good faith, present affidavits which he verily believes them to be true, and demand a new trial in order to protect his interest both in law and in equity?
8. Should a plaintiff make a false claim in a false complaint, be held in contempt?

Argumentative Answer on the "Motion to Dismiss Appeal" and to Dismiss "Petition for Certification" in the Supreme Court of New Jersey, based upon the following Supplemental Brief, and Appendixes Nos. I, II, III.

IN THE

SUPREME COURT OF
THE UNITED STATES.

OCTOBER TERM, 1949.

No. 552

WILLIAM R. MESTICE,
Petitioner,

vs.

ANTHONY MASI,
Respondent.

The petitioner, William R. Mestice, further shows unto your Honors:

1. That he denies as to allegations contained in No. 1, 2, 3, 4, in that the appellant due to an accident on the seventh day of August, 1949, he has been confined into the Fitkin Memorial Hospital, Neptune, New Jersey, with a broken back, and being placed in cast of plaster-paris, he has been physically unable to comply with the absurd demands of the plaintiff's attorneys of record, namely Frank G. Masini, and Leslie Kohn.

2. That said attorneys in the meantime have taken advantage of the appellant's physical condition, and have obtained *ex parte* orders to achieve their illegal intents, and to divest the appellant of legal protections which the laws provide in such circumstances, and this is in violation

of Rule 2:12-3 in that: an application for an order shall be by motion, and in writing, and since the appellant was confined at the aforesaid hospital on the 29th day of August, 1949, the *ex parte* order vacating the stay of execution was improperly issued to the detriment of the appellant, and it should be set aside, moveover, the presiding judge, and the said attorneys, were fully informed of my confinement at the aforesaid hospital.

3. That said plaintiff, and his attorneys, have no right to complain, and demand the dismissals of my appeal, and my petition for certification, since they are well covered with ample surety with a legal interest at 6%, therefore, the Rule 1:2-1 does not apply, furthermore all rules have its exceptions, and are subject to modifications, if the same contains rigidity, for the reason whereof, discretionary implications should be made and provided.

4. The Rule 1:5-2, as contended by the attorneys of record of the plaintiff-respondent, is not consistent, and it does not apply because the Petition for Certification contains reasonable demands that there should be a thorough investigation as to the conduct of the trial hearing, and the abuses of discretion practiced by the presiding Judge Joseph E. Conlon concerning, or touching his denial in the appellant's application for a trial *de novo*, and his reasons for suppressing newly discovered evidence, which were meritorious, and which were submitted in good faith, only to have been refused, or denied on account that said plaintiff, or his attorneys of record, had submitted to the said presiding Judge, false counter affidavits; and which counter affidavits were never served on the appellant, but that said Judge Joseph E. Conlon held in contempt of court, in order to destroy the newly discovered evidence, and thus ob-

structed the true Administration of Justice, with the assistance of his *amicus curiae,* John A. Laird.

5. Therefore, neither the appeal, nor the petition of certification, are in violation of the rules set forth by the attorneys of record for the plaintiff-respondent, Rule 1:5-5, and Rule 1:5-4.

6. Moreover, there are violations of the "Due Process Clause" of the Fourteenth Amendment, and of Rights and Privileges of the New Jersey Constitution, and of the unethical approaches touching the above matters, as to civil, and contempt actions to which the above appellant has been subjected, with malice, by all of those that have been connected in the above matters, and which the above appellant is not, and cannot be disposed to waive the aforesaid inalienable rights so made and provided by the State of New Jersey, and by the Federal Constitution.

Statement of Facts, etc.

1. This action was instituted by the above respondent, Anthony Masi, against the above appellant, William R. Mestice, who contended to have been hurt in the front of the appellant's premises, No. 14 Sixth Avenue, City of Newark, County of Essex, State of New Jersey, on the 26th. day of November, 1945, between 9:00 P. M. and 9:30 P. M. of said evening, and which it is in contrast of the police record, which it says that it happened at 11:15 P. M.; it was reported at 11:41; that he was injured in some unknown manner; that it was supposed to be at 14 Sixth Avenue; that no radio cars were at the scene: that there was no emergency division at the scene; that no other officers and commands were given.

2. That the report was made by Patrolman C. W. Sehlegel, and Anna Masi, whose testimony is in sharp contrast as to time, place and cause of injury, as it is referred in the appendix; that the type of the case was a fall in the street or sidewalk; that he was brought to the St. Michael Hospital on orders of Dr. Caldasco and detained with possible fractured ribs; Act. Lieutenant was J. Crann, 2nd. Precinct. That no where in the report the name of John Lackey is mentioned, nor the name of Mrs. Legnini is therein mentioned, who testified that their brother—Anthony Masi—had returned home injured between 9:15 and 9:30, or thereabout.

3. That this case was tried before Hon. Joseph E. Conlon, Judge of the former Essex County Court of Common Pleas, on the 18th. and 20th. day of November, 1947, and the Jury returned a verdict in favor of the plaintiff, and against the appellant, to the sum of $2,000.00, and execution issued therefor, on the 26th. day of November, 1947.

4. Thereafter, an application was made by the appellant for a new trial, based on newly discovered evidence, but the same was denied on account that the above plaintiff, and his attorneys had procured false counter affidavits, which were never served on the appellant, thus surprised the appellant and his counsel on the 19th. day of January, 1948, and which affidavits are allocated in the appendix.

5. Subsequently, the appellant made another application for a trial *de novo*, based on newly discovered evidence, which were meritorious, and the same being equally denied, the appellant filed a Notice of Appeal. Surety Bonds were filed, after being approved by the said Hon. Judge, whereupon he ordered one John A. Laird to investi-

gate, and interview all the affiants, who became fearfully alarmed by the conduct of the said John A. Laird as *amicus curiae*, and so in order to destroy the said newly discovered evidence, said Hon. Judge, in order to conceal the blunders and irregularities committed by him, during the course of the trial hearing, he preferred to hold the appellant in contempt by a summary proceeding, and thus inflicted a severe sentence against the appellant, which it has no precedence in the State of New Jersey.

6. That prior to the hearing, one Troy of the Prosecutor's office, went personally to see all of the affiants at their home then he subpoened them at his office, and after hours of questioning, made them sign some affidavits, and before the hearing in Court, said John A. Laird had again the affiants in the Judge's library for a good while, with the said detective Troy, who then and there refused my admittance, while preparations were sinisterly made, and this was wrongful, cohersively done, to the detriment of the appellant.

7. That a Rule to Show Cause was signed by said Hon. Judge, which was served upon the appellant on the previous day, without an indictment, without a jury, and without the assistance of an attorney, on the Fourth day of June, 1948, which was continued on the Seventh day of June, 1948, and a sentence imposed on the Eleventh day of the said June, 1948, at Three (3) months and $1,000.00 fine, or at Six (6) months at the Caldwell Penitentiary, in the County of Essex, State of New Jersey, and which sentence is abusive, arbitrary, and illegal, it being extra judicial, and contrary to the Rule 2:8-2, which contempt proceedings shall be prosecuted (a, thereof) in the cause in which it occurs; that a reasonable time shall be given for the preparation of the defense

(d) that if the contempt charged involves disrespect to or criticism of a judge, etc., that judge is disqualified; and the R. S. 2:15-7-8 says that upon conviction the fine should not exceed the sum of $50.00 and the offender may be held until such a sum has been paid; and that R. S. 2:15-1 says: that the offense must be made in the actual presence of the Court.

8. That the said Hon. Judge besides of his being disqualified to preside as Judge, and therefore, any sentence which was wrongfully imposed by him, it is null and void, on account of its illegality, and in violation of "due process" of the Fourteenth Amendment of the Federal Constitution of the United States, and of the Rights and Privileges Nos. 8- 9- 10- 11- 12-, of the New Jersey Constitution and the Rules of Practice 2:8-1; 2:8-2, a, d, e; " ;2:8-3; 2:9-1, a; 2:9-2; 2:9-3; 2:20-5; 3:10-4; 3:80-1; 3:80-2, d.

9. That upon the sentence, illegally pronounced by the said Hon. Judge Conlon, the appellant announced to the said Judge that he then and there was appealing to the Supreme Court, demanded his release, pending the appeal, and then and there prayed for the continuance of the filed bond, and which Notice of Appeal was then and there filed, and made a part of the within appendix, but this prayer was denied.

10. That there was no source of justification, or of convincing proofs on the part of Judge Conlon, or his *amicus curiae,* John A. Laird. That any statements or affidavits, made by the affiants to the *amicus curiae,* to the plaintiff, or its attorneys of record, to detective Troy, or any repudiation made by the affiants in open Court, which may be contrary, as a whole or in part, to the affidavits filed with the Court, by the appellant, be considered of no value or effect by the Court, because

any repudiation or adverse statement of the affiants, both outside, and inside of the Court Room, were not made by their own free and independent will, but were obtained wrongfully, cohersively, by trickery, threats, or by false promises, to the prejudice of the appellant.

Therefore, according to Rule 2:8-2, said contempt proceedings fundamentally, cannot be considered as criminal nor as civil, because all facts related thereto, were to be judged by a duly impanelled jury and not by Judge Conlon, or by his *amicus curiae* John A. Laird, or by detective Troy; and for the purpose whereof, all of the affidavits may be evaluated, and considered in the within appendix, together with the applications for a new trial.

Appellant's Memorandum.

On Appeal from Essex County Court of Common Pleas Transcrip of short hand notes of testimony taken on the 17, 18, 19, 20th day of November, 1947, by Simon J. Flynn, and George A. Flammer, No. 707, Case No. 84192, before Hon. Joseph E. Conlon, and a Jury.

Appearances.

For Anthony Masi—Plaintiff—Frank Masini, by Leslie Kohn,

William R. Mestice, *Pro Se*, Defendant.

For Jerry Fiore—Co-Defendant—Pellegrino J. Pellecchia, by John Malanga.

Simon J. Flynn, C. S. R. Certified Short Hand Reporter.

1. William R. Mestice prayed for an adjournment, not being ready for the trial hearing, unassisted by counsel, demanded for a month for final preparation, but the motion was denied, a jury was empaneled and swo[illegible] some jurors refused to accept their place as jurors, on account that the motion was denied.

2. Defendant demanded that plaintiff's complaint be dismissed on the ground that the complainant had failed to state that he was free from contributory negligence.

ARGUMENT.

POINTS I AND II.

The Court should have dismissed the complaint of the plaintiff, because the work was done by an Independent Contractor.

The Court erred as to motions of No. 1, and 2, for having denied an adjournment of the trial hearing for the reasonable time of a few weeks, so that the defendant could have engaged a trial lawyer, and subpoena those witnesses which knew of the work as it progressed from time of the begining to its completion, instead of placing the appellant to the mercy of the plaintiff's well organized, and prepared venture, of a romantic type, in order to defraud the appellant, within the law, to make even Pressie Squire, who had been engaged by the defendant, together with the co-defendant Jerry Fiore, as an Independent Contractor, who were to make a complete job of excavating, lowering the oil tank, and who, together with the said co-defendant Jerry Fiore was to do the plumbing connection from the said oil fuel tank into the cellar of the premises, commonly

known, and described as No. 14 Sixth Avenue, in the County of Essex State of New Jersey.

R. S. 2:27-348-352-355, says that:

> "An appeal shall be in the nature of a rehearing upon any question of law involved in any ruling, order, or judgment below, *et seq.*"

R. S. 2:27-243:

> "That additional evidence be legally introduced, and made part of the record"

Case of *Sarno* vs. *Gulf Refining Co.*, 99 N. J. L. 340, Court held:

> "That an independent Contractor, he alone, and not the defendant is liable for the fault, or negligent execution of the work of removal of a gas tank."

POINT III.

The Court should have dismissed the complaint against the weight of evidence.

The Court erred in denying a motion to nonsuit the plaintiff on the ground that there was not a scintilla of proof that said plaintiff had fallen before the defendant's premises; it all appears to be a pure fabrication of his. He has personally stated on the witness stand to have come out from a bowling alley and tavern, situated at Cutler Street, and Sixth Avenue, which is a half block, from said premises, to 14 Sixth Avenue, where the oil fuel tank had been placed, and buried, and which place has a brick stoop, and parapet leading from said bowling alley, and tavern, to the said corner of Cutler Street, and Sixth Avenue. He also stated that he could not see, it being dark, and he had screemed for help, but he received no response.

This is purely fantastic, and absurd, because that particular section is well lighted, with plenty of shopping stores, and clubs, and many pedestrians go about, it being a tenement house block, and each of which, has between from 9 to twenty (20) families, and over, with many children of teen age playing, and running around the said populated block.

Said plaintiff could never had fallen before said premises for the reason that there was no hole, and the said sidewalk had already been levelled out, by the laborers, and there were no pipes exposed, because everything had already been covered by November 26, 1945. Moreover, nothing shows in any of the witnesses' testimony that he had any scars over his face, hands, shoulders, or elbows, or that he had his clothes soiled in any way or form.

Anthony Masi, page 8 of transcript (fell) nine o'clock.

Page 30:

> "I fell at 9 o'clock or 9:30. Got home about 9:30, etc."

The above testimony of the plaintiff, Anthony Masi, and that of his sisters, and the police officers is in sharp contrast of the police reports as made by themselves; to me being 9:30 P. M., where in facts the police record shows to be

> "At 11:15 P. M., which was filed by the same police officers on November 26, 1945. * * * Supposed to be at 14 Sixth Avenue. * * * He was injured in some unknown manner. Officer C. W. Schlegel, Shield No. 853. Act. Lieutenant J. Crane—2nd Precinct."

The plaintiff is the only one to state to have been injured at 14 Sixth Avenue. The plaintiff

has testified to have screamed, but no one was around—*Testis Unus, Testis Nullus,* one witness is no witness.

The respondent has testified to have come out from the pool, billiard and tavern at Curler Street and Sixth Avenue, which is only one half block from the aforesaid premises of the appellant, and his testimony coincides with that of Louis Bourget, who has testified in open Court to have seen the said complainant—Masi—fallen, and upon whose affidavit a new trial was demanded, and refused by Judge Conlon.

Officer Charles W. Schlegel at page 92:

> "Q. On November 26, 1945, did you receive a call or a communication with reference to premises No. 14 Sixth Avenue? A. It was at 12:30 A. M. on the 27th, November 27, we received an assignment in Radio Car 22 to go to St. Michael's Hospital to get a report for the precinct. * * * I saw the plaintiff. He was on the cot there. Then went to the premises and met the two women about one o'clock in the morning. Found 3½ feet tank was therein." (p. 93).

at page 94:

> "There was no planks. * * * To look at the excavation, on the word he had received from the two women. In fact he had made a report about it."

at page 95:

> "That was about one o'clock on the 27th.
>
> Q. You mean to say these women reported to the precinct? A. That's right.
>
> Q. When these women saw you, what did they say to you? A. Well, I couldn't remember the exact words, but we were informed that this man fell; and they wanted us to see that there weren't any safeguards placed,

there weren't any lanterns there, there were no planks, or anything else."

at page 97:

"You weren't there prior to one o'clock in the morning? A. No, sir." (He knew nothing from 7 o'clock to 1 A. M.)

Anna Masi, at page 147:

"Q. What time of the evening was it when your brother came home? A. After 9 o'clock or so."

at page 151:

"Q. Where did you and your sister (Margaret Legnini) go? A. We went to the Second Precinct."

at page 154:

"It was around 9 or 10."

at page 160:

"A. My sister picked me up and we went and made a report to the officer.

Q. What time was that? A. It was after 11 o'clock, around that time."

Bernadette Bonocore at page 114:

"Q. Everything was finished in a couple of weeks? A. Yes.

Q. Everything was completely covered, you mean? A. Yes.

Mr. Mestice: That's all."

Jerry Guarino, at page 115:

"Q. What was the condition which you observed during the month of November? A. Why, there was a hole there for about a month. After a month they put the tank in there. * * * I told him to have that covered

because if I fall in there, he is going to hear from me.

By the Court: Whom did you tell?

A. The owner.

Q. Do you know his name? A. I don't know his name, but I know him (at p. 117) around December 13, 1945, and (at p. 118) this witness said, 'Tank was lowered a month later—Colored men lowered it.' "

Where in fact, and according to other testimony the said tank was lowered on the second day of the excavation within five minutes.

Said plaintiff claimed to have paid for the

Smith ambulance	$ 12.00
Hospitalization	15.65
Doctors charges	125.00
X-rays	15.00
Laboratory	5.00
Being out of work	120.00

That the jury not only rendered a verdict against the weight of the evidence submitted by the said plaintiff, but it rendered an excessive damage sum of $2,000.00 in his favor, and against the defendant-appellant.

POINT IV.

The Court created prejudice against the defendant by failing to make Pressie Squire a co-defendant and by asking John J. Malanga of counsel for Ex Judge Pellegrino (Jimmie) Pellecchia to demand a motion to non-suit the plaintiff as against the co-defendant Jerry Fiore.

The Court erred in granting the motion to the co-defendant, Jerry Fiore, prior to the submission

of evidentiary facts, and documents, by the defendant-appellant, which would have rendered him liable as a whole or in part, since he was directly responsible, together with the aforesaid Pressie Squire, to the contribution of the accident in question, the latter having done the excavation, and lowered the tank, together with two other colored men, who then and there, had engaged, and paid out, said men, himself, since there had been an agreement that said job should been thoroughly completed at the agreed price of $75.00, that the plumbing connection was to be performed by the said Jerry Fiore, who was to be paid by the said Pressie Squire out of the said $75.00, and since the work was not proceeding as scheduled, the defendant-appellant, to ameliorate the situation, engaged another plumber, and the sidewalk was thereupon levelled about one week prior to the date of the accident as complained by the above plaintiff-appellee.

The defendant-appellant, thereupon, paid said Pressie Squire the sum of $40.00, on account that the agreement had been breached by him, and that the deduction of $35.00 was very reasonable because the herein defendant had to pay for plumbing parts needed, and for the levelling of the said sidewalk in front of the aforesaid premises.

Within parenthesis, the defendant-appellant may ask the Honorable Court, with veneration, and reservation: From what power, or authority, has the presiding Honorable Judge, a legal right to demand of the co-defendant Jerry Fiore to ask to be non-suited? It may be noted that said co-defendant was represented by Pellegrino J. Pellecchia (presumably, a close friend of his, and John J. Malanga acted in his stead) better known as the Ex Police Court Judge of Newark, N. J., self confessed embezzler of the defunct Colum-

bus Trust Co., and afterward being sentenced by the same Judge Joseph E. Conlon, who said that the said Ex Judge had made a considerable damage to the New Jersey Judicature, while in practice, he has abused his authority in the above matters, relentlessly and wantonly.

At line 1, on page 188 of the transcript of testimony says:

"The Court: I presume there is a motion for a non suit.

Mr. Malanga: Yes.

The Court: Don't you think you should answer the motion?

Mr. Kohn: Yes.

Mr. Mestice: If your Honor please, I have several motions. One is that the complaint, first of all, fails to state a cause of action, and it does not set forth that the plaintiff was free from contributory negligence.

The Court: Please. Will you please state the ground of your motion without arguing? That's one motion.

Mr. Mestice: Yes.

The Court: What is your next motion?

Mr. Mestice: The next motion is that the plaintiff has not proved by circumstantial evidence, or direct evidence that the man (the plaintiff) fell in front of 14 Sixth Avenue.

The Court: What is your next motion?

Mr. Mestice: That the plaintiff contributed to his negligence in that he did not exercise reasonable care, reasonable prudence that any man would, under similar circumstances.

(At this time defendant-appellant had fully realized, and was thoroughly convinced, that His Honor, Joseph E. Conlon, wanted said defendant to hold the bag for everybody, and make friends at my expense.)

The Court: Have you any other grounds for your motion?

Mr. Mestice. No.

The Court: The motion will be denied, and you may have an exception.

Mr. Mestice: Thank you.

Mr. Malanga: I respectfully move for a non suit in this matter for Jerry Fiore, etc. up to page No. 193 of the said transcript.

The Court: Now during the recess, for your information, there was a motion made on behalf of the defendant Jerry Fiori in this case. As result of that motion, the Court directed a non suit as to the defendant Jerry Fiori, so that the case will proceed for your consideration, by Anthony Masi against William Mestice as the only defendant."

This was error on the part of the Court to non suit said co-defendant Jerry Fiore (Mr. Malanga was of counsel for the Ex Judge Jimmie Pellecchia) whose discharge greatly prejudiced the jury against the defendant-appellant; and it may readily be seen from the testimony of the defendant—Mestice—that Fiore, and Pressie Squire, were directly responsible as independent contractors.

The defendant-appellant's working-men, have done everything in their power to prevent any kind of accidents, or inconvenience to protect the pedestrians by placing across very heavy beams, or planks across, with lanterns on each side of the excavation until the sidewalk had been totally levelled, by replacing very large flagstones, and by making some new concrete, this being covered by the testimony of Annunciato Della Palma at pages 193 to 204; and by Christina Bourget at pages 204 to 221, and so on with the testimony of the defendant-appellant which very clearly shows that said defendant and laborers did every thing to bring the job to completion in the shortest time possible; and at pages 257, 258 it appearing that the aforesaid Fiore and Pressie Squire were solely

responsible for their breached agreement, the plaintiff's attorney and the Court did try in vain to upset the true facts involved, and in order to pin the defendant-appellant down, they combined vicious intimidations, and it appears that the attempt was one to make me say things which did not exist:

Bottom of page 257 of Transcription, on the last line:

> "The Court: Answer the question, will you please? We have been very patient in this case * * * the Jury and I. I am personally running out of patience * * * etc."

At line 1, at top of page 262:

> (Answer by Mestice) "That everything had to be done by Pressie Squire and if he didn't do it, Fiori was going to do it.
> Q. You knew——
>
> The Court: It is perfectly obvious that this witness (Mestice) does not want to answer the question. * * * "

At the bottom of page 263 (line 9 from the bottom):

> "Mr. Mestice: There is one thing I want to introduce and that is: I paid Jerry Fiore with a check of $40.00, on November 14, 1945, for a plumbing plant.
> Mr. Kohn: I have no objection.
> The Court: I object to it. I don't want * * *
>
> Mr. Mestice: This is to prove that Mr. Fiore was on the premises, and discussed the thing with Pressie Squire.
> Mr. Kohn: Now I want to ask some more questions.
> The Court: No, no, no. This is a check given to Fiore for a plumbing plant. I won't accept it. I will rule it out. Have you anything else?

Mr. Mestice: May I put my witness on the stand to indicate this check was accepted by him on that date?

The Court: What witness? I understand that check was for a plumbing plant.

Mr. Mestice: And at the same time it was discussed * * *

The Court: I won't accept it. The testimony is objected to, and I sustain the objection. * * * "

Was the Honorable Judge the attorney for Jerry Fiore?

This was error, and arbitrarily abusive on the part of the presiding Honorable Judge, in that he forbade the defendant-appellant to introduce documentary evidence that said Fiore was present, and that he personally directed said Pressie Squire how and where he had to do the digging, and supervised the job.

This clearly indicates that the Honorable Judge was not disposed to let the truth come out by introducing documentary evidence showing that the defendant-appellant had paid by checks, plumber and helper, which had been engaged by him, and which he had assumed all responsibility of supervision of all plumbing, both inside and outside of aforesaid premises and which checks are dated: November 9, 1945; November 14, 1945; November 17, 1945; November 24, 1945; December 1st, 1945 (2); December 3rd, 1945 (2); December 3rd, 1945; January 11th, 1946, and January 25, 1946.

The Court refused to let said documents become a part of the record, notwithstanding that the plaintiff had no objection therefor, and this was error in so doing, which greatly prejudiced the jury to the detriment of the defendant-appellant.

POINT V.

The Court should have non-suited the plaintiff because Pressie Squire acted as an Independent Contractor.

That the testimony which was produced by Pressie Squire clearly indicates at page 121 of transcript that the agreement was set at $75.00, that he had engaged two (2) other (colored) men to work for him, and which were paid by himself, and then and there the tank was lowered by himself between the 13th and 14th days of November, 1945, and planks, and lanterns were placed thereto from said dates, and ever since, until the whole job was completed and sidewalk perfectly restored, and all dirt being removed, and this clearly indicates that he acted, and that he personally controlled his own employees, as an *independent contractor* would have done on similar undertakings.

That since he failed to perform his work as per agreement, said Squire accepted the sum of $45.00 for his work done on the theory of *quantum valebat,* and *quantum meruit,* as per check dated: March 12, 1946, and as per bill rendered dated: December 13, 1945, and in letter form which it reads as follows:

"Mr. William R. Mestice

Dear Sir:

I do want to take $45.00 for the job on 12 Sixth Ave. Newark, N. J. for to perform the complete job as contracted at $75.00. I hereby accept $45.00 in settlement of the whole contract.

March 2, 1946

P. Squire
159, So. Orange Avenue
Newark, N. J."

That said check, and bill, and letter of the above said Pressie Squire was introduced in evidence as D-M 1 and 2 respectively, and still the Court permitted the plaintiff to have said Pressie Squire to be a witness for the plaintiff, and refused to make him one of the co-defendants, and this was error to the detriment of defendant-appellant, and prejudiced the jury therefor.

POINT VI.

The Court should have dismissed the action based on the contradiction of its own witnesses.

That the testimony of the plaintiff's witnesses are very self contradictory, and unworthy of credence, in that they had ever seen any planks, nor lights, and that it had taken said Pressie Squire between two weeks, and over a month, to lower the tank, they have so over exagerated their testimony that it would be a waste of time to mention any of them; as of Jerry Guarino, at page 115 on direct examination of Kohn, he said on the 3rd line, top:

> "A. Why there was a hole there for about a month. After a month they put a tank in there, etc".

at middle page, at page 118 he deliberately reaffirms to have been a month to lower the oil tank, when in fact Pressie Squire took him about five minutes to lower said tank on the 14th. day of November 1945; It may be noted that said Jerry Guarino is a personal friend of the above plaintiff, and employed in the Second Precinct, from which Police Station the Radio Policemen who also testified in this case for the plaintiff, their testimony may be considered as unworthy of cred-

ence and their report says that they had not seen any one falling thereat, that the accident "in some unknown manner at 11:15, and the report was made at 11:45 P. M." and it does not say anything further; that all the testimony of the said officers were false, and their contribution made a very strong impression of the testimony of the plaintiff's sisters, who were self serving for the benefit of their brother, and who helped to create a false impression upon the jury, and said Police Station is only about a few blocks distant from 14 Sixth Avenue, and they all have patronized the Tavern at the corner of Stone Street and Sixth Avenue, with the Bonacore selling them groceries, who also has been one of the witnesses for the plaintiff, and who has a grocery store in the same block, who testified that there were never any planks, nor lights, and the testimony of De Filippis is likewise unworthy of credence since he is a personal friend of the plaintiff, and been employed in the said tavern as a waiter, and cook of the whole.

POINT VII.

The Court should have disqualified the testimony of plaintiff's sisters, because they were self-serving, for his benefit.

That the testimony of the plaintiff, and of his devoted sisters, should not be taken in consideration, their being self-serving adventure. Their testimony say that the same evening they made the complaint at the aforesaid Second Precinct, notwithstanding the fact that their brother plaintiff was at the Hospital, and stood in front of the defendant's premises up to about One A. M. Their testimony is not only self-serving, but as unworthy of credence, because if their brother's

story was true, they could have made the complaint in the following morning, or a few days thereafter, and not stayed out in a cold winter, exposed until about After Midnight. Such a testimony is purely fantastic.

POINT VIII.

The Court should have granted the motions demanded by the defendant and charged the jury as requested.

The learned trial Judge erred in failing to give any consideration to the "Final Motions And Request of Charges To The Jury." and exceptions duly taken therefor, by the defendant-appellant, and which said "Defendant's Final Motions And Requests To Charge To The Jury" are at Pages of the Transcript 287 to 291, and this was error in so doing to the prejudice, and detriment of the defendant-appellant.

The learned Judge has been self-contradicting in saying to the jury, at the bottom of page 268, *et seq.* that the Jury is the sole, and exclusive judges of the facts, whereas, in fact, in the middle of the said page (268) he said to the Jury: at line 11th from the bottom:

> "You will remember that originally there was another defendant in the case * * * Jerry Fiore, but that during the course of the trial the Court entered a non-suit as to that defendant. So he is not within your consideration. The case proceeds and is presented to you for you consideration by Anthony Masi against the defendant, William R. Mestice."

This colossal error on the part of the learned Judge give an enormous rise of prejudicial aspect, wherein He himself says on one hand that

the Jury has the sole and exclusive judge of the facts, while on the other hand, he, *sua sponte* granted a non-suit in favor of the said co-defendant Jerry Fiore, when there were sufficient, evidentiary facts which should been decided by an integral Jury.

That the learned Judge, in His charge to the Jury, has, in fact, built the case for the plaintiff, and instructed them as to what kind of verdict should been expected from the component members of the Jury, be it on negligence or on public nuisance, and this was error in so doing to the prejudice of the defendant-appellant, when in fact there was no public nuisance of any kind but every thing was done, and carried to completion within the law, and as prescribed by law.

The transcript of record clearly indicates that a proper legal, permitted document, was introduced to the Court by the appellant, and by the plaintiff himself, through the testimony of the Fire Department Inspector at page 48, which it states that the permit application was granted on November 7, 1945, by the said department, and this was an extremely prejudicial, error—charge to the jury being detrimental in character, and *at damnum.*

POINT IX.

The Court failed to explain to the jury the meaning, and the responsibility of the Independent Contractor.

That the learned judge failed on the other hand to instruct Jury as to charges contained in the defendant-appellant's request of charges, as to the liability of an *independent contractor,* the proximate, and remote cause, the *"but for rule,"* (The

plaintiff's attorney is at loss to understand the "But For Rule". Said Rule has been fully explained in different words in "Request of Charges to the Jury" as of: If an intervening party had removed the planks, the plaintiff would not have fallen. That is to say: that the accident happened *but for* the Third Intervening cause, or by a subsequent chain of causations.) and of an intervening cause, such as of removing or destroying that which the defendant had done in protection of pedestrians, as a protectory, or precautionary measure for the public's benefit, and safe guarding of their limbs while the work was performed by the aforesaid Contractors.

POINT X.

The Court should have instructed the jury to reconsider the verdict for the amount of $2,000.00 as excessive.

The evidence being closed, and submitted to the Court and Jury, who returned a verdict in favor of the plaintiff, and against the defendant-appellant to the sum of $2,000.00, against the weight of evidence for unaccounted irregularities, by the learned presiding Judge, and who then and there entered such a judgment together with costs at $122.73, and execution issued on November 26, 1947, which was published in the newspapers for the sale of the said properties at 12 and 14 Sixth Avenue, in the City of Newark, County of Essex, State of New Jersey, without consulting or advise to the defendant-appellant; and this brought the attention of those who had knowledge, or informations in regard of the contended, and pretended accident of the above plaintiff.

POINT XI.

The Court should have granted a new trial, based on the newly discovered evidence.

Request for Trial De Novo.

That on or about the 23rd day of November, 1947, the defendant-appellant was approached by one Jerry Volpe, who having read of the result of the trial in the local newspapers, he advised him that the plaintiff was an astute character, an insurance man, and then and there he invited me to go up to his apartment, and offered to testify as to what he and his wife knew about the case, and which invitation I accepted, and told them that I would see them again on the following day, after working hours.

Whereupon, the appellant went up to the said apartment, and wrote whatever said Volpes had then and there said *viva voce;* thereupon they swore to the contents thereof, after that a copy thereof had been handed to them for their reading, and consent of approval as to the said contents, and which was in the affirmative, in the presence of one Henry Stabile, whose affidavit was also made and signed in their presence, as to the contents thereof, after being sworn.

Thereupon a Rule to Show Cause was signed by the learned Judge and which was made returnable for January 17th, 1948, at which time the plaintiff's attorney had secured a false counter affidavit, which is vicious, false and self-evident as perjurious in nature, and in facts; and at the same time said plaintiff's attorneys, and the said Jerry Volpe went to the said Henry Stabile's home, and there they secured another false counter affidavit, which it is also perjurious as to facts,

and in nature, in order to obstruct justice and to defraud the appellant within the law.

The motion for a new trial was consequently denied, which was a total surprise to the appellant, and to his counsel who was representing the said defendant-appellant.

POINT XII.

The Court had enough new evidence to grant a new trial.

That on or about November 26, 1947, the defendant-appellant had received a letter from one Mrs. O'Rouke, who contended that:

"Dear Mr. Mestice:

This is to advice you that I read in the paper. About the case of Masi vs. Mestice. In that there was a verdict against you fore two thousands dollars, $2,000.00.

I cant see how this could been done. I remember that there were planks on boath end of the excavation where the oil tank was placed in. I further remember that this happened about November 15, 1945 And that there were also lantern lights.

The same condition existed on I know November 26, 1945 after 8 P. M.

Very truly yours

Mrs. Atoinette O'Roke

Filed December 3, 1947
Russell C. Gates, Clerk"

The above letter proves, or indicates that planks and lantern lights were affixed to each end of the sidewalk to protect the pedestrians.

That on or about December 1st, 1947, one Pasquale Martino made out an affidavit stating that

the excavation was made, and the tank lowered then and there on November 15, 1945, and he himself had soon thereafter covered the said excavation to the top with soil which was even with the sidewalk, and said process he continued practically every day, until the soil had been well settled, and flagstones replaced.

POINT XIII.

The Court should have granted a trial *de novo* as applied by defendant.

That thereupon, Anthony Volpe, being informed that his brother Jerry Volpe, had made out a false counter-affidavit against the defendant-appellant at the request of the plaintiff and his attorney, Masini, he advised and suggested that his said brother was unworthy. However, I cannot see how he could lie against you and get away with it, said he, because I was down stairs, and I did see him in front of the house (16 Sixth Avenue, Newark, N. J.) while they were talking together; thereupon, said Anthony Volpe, then and there gave his address to the defendant-appellant, and made an appointment to meet him at his home, and said that he would have signed an affidavit, exposing all the related facts concerning the above matter, because said Anthony Masi had not fallen in the front of 14 Sixth Avenue, and which affidavit was signed on March 15th, 1948.

POINT XIV.

The Court had sufficient new material which was meritorious, to grant a new trial.

That on April 21st., 1948, one Louis Borguet, had furnished the information—to appellant—

that he had actually seen, said plaintiff, fallen when he came out from the bowling alley—tavern —from the brick stoop, and against the cement parapet siding said brick steps, and helped said plaintiff to get up on his feet, and who, then and there, refused his assistance, by claiming that he was all right, and he needed none of his help.

That the above affidavits were filed with the Court in good faith by the appellant because he really believed that all of the affiants were telling the truth, and for the reason whereof, said appellant, renewed his prayers for a trial *de novo,* but the same was denied, notwithstanding the fact that the application had its legal right, worthy of consideration, on account that said affidavits contained newly discovered evidence, meritorious in character, and convincing as a matter of facts therein disclosed.

That his personal friend, one Hubert Harrington, had made a personal investigation of all the affiants, and was satisfied to the extent to advise said Hon. Judge, Joseph E. Conlon, that if he would not had given a new trial to the defendant-appellant, there would have been a *miscarriage of justice,* and such a telephone conversation was made from his office to the Chamber of the said learned Judge, in my presence, and that of the above affiant Louis Bourget, after that he had personally conversed, and had investigated him to his own satisfaction.

And since that said application had been denied for a new trial, then and there the appellant did file the "Notice of Appeal" and this infuriated said Hon. Judge, who did not wish to have disclosed his bias, and irregularities, committed by him during the course of the trial hearing, and did not want to be reversed by the Appelate Courts, and thereupon, he ordered an investigation

of all the affiants, by scaring them out, through detectives, by issuing subpoena to the prosecutor's office, and by antagonizing them repeatedly with subpoenas, by calling them to Court, and by yelling, and screaming at them, while they were testifying, some of which were pale and shaky, while others became indignant to the Court on account that the said Hon. Judge wanted them to say things to the contrary, and they, in turn became reluctant, and the same viciousness was practiced by the *amicus curiae*, John A. Laird, whose theory was: By holding the appellant in contempt—*summarily*—he could have done as he pleased, and everything would have been concealed, dead, and buried, at the expense of the defendant-appellant.

On Rule to Show Cause for Contempt.

Judge—Hon. Joseph E. Conlon—Presiding.

Appearances:

For Judge, Hon. Joesph E. Conlon, John A. Laird, as *Amicus Curiae*.

For the Defendant, In Contempt, William R. Mestice, *Pro Se*.

Appellant's Memorandum.

On Appeal from Essex County Common Pleas Court.

Transcript of shorthand notes of testimony taken on the 21st day of May, 1948, June 4, 7, 1948, by Simon Flynn, before Hon. Joseph E. Conlon.

POINT XV.

Judge Joseph Conlon should not have instituted any contempt against the defendant, because said defendant has a legal right to apply for a new trial based on newly discovered evidence, which were meritorious, and he was disqualified to preside as Judge, because he was the accuser through his *amicus curiae* John A. Laird.

Rule to show cause was served upon the defendant-appellant on the evening of May 19, 1948, and said rule was made returnable on May 21st, 1948, why the said defendant should not been held in contempt.

The defendant-appellant was placed in a very peculiar play. Several attorneys had declined to take over the case; some of them said that Judge Conlon was out to crucify me. The time was short. The defendant was placed at the mercy of the Court and its *amicus curiae*, John A. Laird. The hearing was adjourned for one week on account that the Judge's sister had left this world, I finally was successful to engage an attorney who prayed Judge Conlon to give him a chance to get the transcript of the testimony being had up to that time and thereupon he would have continued therefrom. This was denied on account that the said stenographer was very busy with the transcript of Cordasco's murder case; whereupon said attorney refused to go on with my case. This, however, does not appear in the transcript, but he demanded of the defendant-appellant to provide himself with an attorney in open Court so that this unscrupulous suggestions could been made as a part of the record to make things appear smoothly on the surface, in order to conceal his premeditated designs.

POINT XVI.

The presiding Judge and his *amicus curiae* by their acts, have, by operation of law, made themselves contemptuous.

That the proceeding was started at the initiative of the learned presiding Hon. Judge Joseph E. Conlon, and his *amicus curiae* called upon the affiant Louis Bourget who testified on page 7 of the Transcript of the Testimony as follows:

(By Laird)

"Q. I am going to show you an affidavit which appears to contain your signature and ask you if that is your signature. A. Yes, that's right.

Q. Will you please tell us under what circumstances you signed this affidavit.

Mr. Mestice: I object, your Honor, on the ground that the affidavit speaks for itself, the affidavit was submitted to the witness, and he acknowledged that, that is his affidavit which he signed, and everything therein contained. So we are here to justify whether these affidavits are true or false. I don't think that we have any alternative.

The Court: I will overrule the objection.

A. Well, no, I couldn't really remember.

Mr. Mestice: Keep your voice up, please.

The Witness: Mr. Mestice read it to me, and I signed it.

Q. Did you read it over before you signed it? A. I read it, yes."

(On page 8) he says:

"A. * * * I seen the planks, but I didn't tell him I seen any lights (This because he was working at nights, and he was leaving his house during the day time, but that occasion-

ally he had seen lights, or lanterns, many broken by children, or had been removed).

and on page 9 he admits of having seen falling the said Masi on Cutler Street and Sixth Avenue, etc., and at page 11 the affiant says that:

"A. I am pretty sure it is the same man, yes.

Cross examination by Mr. Mestice:

Q. I hereby introduce you a photograph. See if you can identify this with the permission of the Court. A. Well, this (Interrupted by the Court) * * * can I talk now?

Q. Yes. A. This is the step where the man (fell) I picked up the man on the bottom of the steps. I was coming across the street like that.

The Court: Keep your voice up.

A. (Continuing) I was going up Sixth Avenue, going to the store. I had to go through Cutler Street, and there is a step there. When I came by then I found the man all hurt bad. By the Court:

Q. That is a picture of the step that you saw the man fall from? A. Yes.

The Court: Have it marked for identification.

(Photograph Exhibit D-1 etc., D-2; D-3).

On page 16 Bourget says:

"A. Well, about half past five, then they put them up, (meaning the lights). But after that I didn't see any lights there * * *" (but saw the planks, at 9:45 of that evening of the accident).

That the affiant Louis Bourget, although he had been under tenacious strain by the detective Troy, and Laird, and the Hon. presiding Judge, they could have made him change his testimony, and this indicates that the appellant submitted all affi-

davits in good faith to the Court. It may be conceded, that it is rather difficult for any counsellor to put in writing every single word that may be proffered by an affiant; the counsellor writes, or dictates to his secretary all of the facts in legal language, and may slightly elaborate the facts involuntarily, or inadvertently, or unintentionally. However, all facts are questions for the Jury to decide, and not for the Court, or for his *amicus curiae.*

POINT XVII.

The Court should have held Jerry Volpe in contempt for his perjurious testimony.

At the bottom of page 30, said Jerry Volpe said:

> "Q. Who was in your presence there when you signed these papers? A. Henry Stabile * * *."

That which followed it is nothing else but false except that I offered to pay for two (2) bottles of beer, one of which was drank by Jerry Volpe, Ann Volpe, his wife, Henry Stabile, and the defendant herein, each of which had one small glass of the said beer; and while the perjured testimony of the said Volpe was going on in a debated fury, on account of his deliberate, false perjured testimony, and of which the presiding Hon. Judge was fully aware of Volpe's falsity, at page 32 it reads:

> "Mr. Mestice: At this time, your Honor, I can't proceed with this witness. It is not exactly a surprise to me, because—(The Court interrupting).
>
> The Court: Now, wait a minute. What do you want to suggest? What do you want me to do?
>
> Mr. Mestice: That is up to the Court to decide.

The Court: What do you want to do? (The Court was Fully aware that the testimony of Jerry Volpe was false, and perjured from A to Z, and he made it go by without holding said false witness for perjury.) Whereupon the defendant-appellant said:

Mr. Mestice: That is up to the Court to decide.

The Court: What do you want to do?

Mr. Mestice: I can't do anything.

The Court: Is there anything you want me to do?"

That the Hon. learned Judge, well knew then and there that said Jerry Volpe had committed false perjured testimony in open Court, and he actually did nothing about it, and made said testimony stand Why?, and for what purpose? What was his reason beyond the whole? Jerry Volpe was his witness, as well his *amicus curiae.*

POINT XVIII.

The Court should have held in contempt, Jerry Volpe, the plaintiff, and his attorneys.

That the Court erred in not holding said Jerry Volpe, the plaintiff, and his attorneys for an indictment before the Grand Jury, when Henry Stabile said at page 40:

"Q. There was an affidavit also drawn at the same time of this here in the house of Jerry Volpe. Do you remember? A. What do you mean.

Q. I mean, were these here affidavits drawn at the same time in Jerry Volpe's house? A. *Yes, they were.*

Q. At the same time? And who was there present? A. You know that. What are you saying it for?

Q. I drew it? A. You wrote it.

Q. With the typewriter. Is that right? A. Yes.
Q. Who was present? A. His wife • • •
Q. Was Jerry Volpe present? A. Yes.
Q. And you were present, and I was there. No body else? A. That's all."

That on page 41 of transcript said Henry Stabile said:

"Q. Mr. Stabile, how did it happen that you went to Jerry Volpe's house this particular night? A. I went to Jerry Volpe's house this particular night because he is a good friend of mine • • •"

That in substance said witness, Henry Stabile, although he said that certain things were incorrectly typewritten, and that one half page only was typewritten, when in fact he admitted that he had gone out to buy kerosine and received $1.00 for his services, and this is stated at the bottom of the last paragraph of the affidavit which had been signed by him, after that it was fully explained as to the contents thereof, and had duly sworn thereto. That said Stabile had also been induced by the plaintiff and his attorneys to sign a false counter affidavit as against the appellant, and—apparently—he had been advised to repudiate his affidavit, been typewritten at one and at the same time and signed by them from top to bottom, and this can be verified by any competent, expert typist.

POINT XIX.

The Court should have held in contempt Anthony Volpe.

That the Court again erred in failing to hold the next witness—brother of Jerry Volpe—namely

Anthony Volpe, who has deliberately committed perjury on the witness stand to support his brother's testimony.

That it was the said affiant Anthony Volpe who had told me about of the happening, and the conversations which it actually happened in the evening of November 26, 1945, whereby Jerry Volpe, Ann Volpe, his wife, Anthony Volpe, and Anthony Masi, the plaintiff, had the conversation that has been narrated in the affidavits, which have been filed in good faith with the Court, and, thereafter, repudiated as a whole, or in part, to the prejudice of the appellant through the influence of the said plaintiff, and his attorneys, as it may be decifered at page 44 of the Transcript:

> "So I told him, I says, 'All I remember, "I says," is that one day I happened to go to the movies, and I came out of the movies at nine thirty, I went up stairs, and I found the door closed, and I was meeting my brother downstairs in the hallway, and I took notice that my brother and his wife was talking in the car right by the hole where it was dug. So my brother was talking to somebody. Now * * *' "

That said Anthony Volpe told the said facts to the appellant, who then and there gave his home address to the said defendant, and who, thereupon, went to his home where the affidavit was signed, in accordance of his given true facts, and which the appellant submitted to the Court, what ever had developed in good faith. And on page 46 Anthony Volpe said:

> "Q. I am going to read this second paragraph: 'That within the said period of time, and thereafter said place was barricated with planks and lantern lights on both ends of the said excavation, which had been filled with soil, in line with the sidewalk thereto.' Did

you tell him that? Well. A. I saw them when they dug the hole, why he was around there——

Q. No, Mr. Volpe. You don't understand me. I am not asking you what you saw; I am asking you what you told Mr. Mestice when he interviewed you. Did you tell him that? A. Well, he asked me, 'Was you around there when the sidewalk was leveled'? So I told him, 'Well, certainly. I walked back and forth there.' etc. • • •

Q. Now, I am going to read you that third paragraph: 'That on the evening of November 26, 1945, about 9:30 P. M. of that evening, I saw the above plaintiff standing and complaining and who said to have been hurt not saying when, where, or how, and arguing incoherently.' Did you tell anything like that to Mr. Mestice? A. Well, he was telling me the story about this fellow that got hurt. So I says to him, 'any fellow with common sense would see somebody painful.' I says, 'the best thing to do is to take him up to the drug store, or rush him to a hospital.' But I says, 'but I didn't see anybody hollering or getting hurt.' • • • "

At the bottom of page 50, and 51, Anthony Volpe said:

"Q. Did he say he was hurt? A. I didn't see nobody get hurt.

Q. That within the said period of time and thereafter said place was barricaded with planks and lantern lights on both ends of the said excavation, which had been filled with soil, in line with the said sidewalk thereto. You knew there were planks there? A. Well, I lived there. I was sitting outside all the time. I always took notice of a planks or something. But as far as anybody getting hurt, I don't know, because I wasn't around there.

Q. As to the time date that you said your brother was talking down below there. What time was it about? A. Well, it was about

nine, nine thirty. That is the time I came out of the movies.

Q. About nine thirty you say? A. Yes."

On page 52, he said:

"Q. You noticed your brother and your sister-in-law talking together with this man? A. Yes.

A letter of Anthony Volpe to William R. Mestice and signed 'Anthony Volpe,' dated March 10, 1948, is marked as D-4.

Q. Now that you recollect your memory, did you dictate this here to me in your house? A. What's that.

Q. I am going to read this to you. A. Yes.

Q. And ask you whether you dictated this to me at your house when I was over to see you: 'This is to inform you that I have read about the sheriff's sale of your properties on 6th Avenue, Newark, N. J. Please be advised that on the evening of the accident, claimed by Anthony Masi I had come out of the movies about eight thirty P. M., on November 26, 1945, and I was home amout nine o'clock. I went up stairs, but my brother was not home, and then I went down stairs again, and later on I noticed the said Masi mumbling to himself, and was talking to my brother, then walked to him and asked him what was wrong with him. Then my brother and his wife came out from their automobile and we told him to go to the drug store, he being drunk, and my brother wanted to take him home with his auto, but he refused any help, and went home by himself. If you can use me as your witness, I will come over to Court at any time, because I don't believe that Mr. Masi was not hurt at all, because if he was hurt I would had gone to the drug store to call an ambulance for him, or that I could take him to the hospital myself with my brother's car. It looked to me as though he did not want to be bothered at all, and so he walked away. Very truly yours, Anthony Volpe.' You signed that? A. Yes, I signed, that; I signed that * * *."

That the Court erred in failing to detain said Jerry Volpe and his brother Anthony Volpe for their perjured testimony in open Court, and which, basically, they self contradicted *ab initio,* and a *priori,* sufficient to put the Court on guard. Why was the presiding Judge indifferent to their fabulous, incredible testimony. Why said *amicus curiae* failed to denounce them? What were the actual implications involved in their mind to achieve, was their intent to let the defendant hold the bag and to elevate themselves at the expense of the said appellant.

POINT XX.

The Court should not have incited his *amicus curiae* to investigate, or to annoy the witnesses, except to cross examine them in open Court, and in the actual presence of the defendant.

That it was error on the part of the presiding Judge Hon. Joseph E. Conlon to permit, or to incite his *amicus curiae* to directly, or indirectly dissuade the affiants to say things which did not exist, or to intimidate, or to annoy them, so that they would have repudiated as a whole, or in part, whatever they had voluntarily signed for, and their testimony should had been narrated at their own free will, and not placed in a stage of fear.

At page 61 of the Transcript:

> "Q. Then it says on this paper that I am going to read you, referring to paragraph 5 five: 'That every evening I have placed across the said sidewalk, planks or heavy beams, with lanterns on both ends, and this I have also done it on the evening of November 26, 1945, and thereafter, until Pressie Squire had completely removed the excavated soil therefrom.' A. Yes, sir.

Q. I think *you told me this morning* that some days you would go home early and the other fellows said they would finish up the job. Is that right? A. Yes."

This clearly indicates as to the last question of the *amicus curiae* that before the commencement of the contempt hearing he had prepared all of the witnesses as to what they had to say in Court, and which wrongful preparation, had taken place in the Judge's library.

That said Pasquale Martino admitted to been true every part of the affidavit, and at page 62:

"Q. That said work was done by one Pressie Squire, with the help of two more men engaged by himself, who were to make a complete job, as soon as the inspection had been passed? A. Yes, sir.

Q. Do you remember about the colored man who engaged two other men to dig out the hole? A. Yes.

Q. They put the tank down? A. Yes.

Q. Do you also remember at that time we agreed that he was to receive from me seventy-five dollars for the full job? A. Yes • • •

Q. Did you put any planks and lights every night? A. Yes; yes sir, every night.

Q. Are you sure there were planks across? A. We covered the hole with the planks, and then we put the fence both sides.

Q. 'That on or about November 23rd, 1945, I have personally covered said sidewalk surface with the replacement, and resetting, the same large flagstones which were laying along side the said premises.' In other words, on this date, more or less, a day before, or after, you put those flagstones over where it was excavated? A. We had the flagstones down and everything even.

Q. You made it even? A. Yes.

Q. Did you fix them up almost every other night? A. Every night we look to fix everything.

Q. Why did you say every other day? A. In the morning, the first thing we had to do was, see that no people fall in the daytime.

Q. Every evening did you place the flagstones? In other words you did this every night? That included November 26th? A. Yes, yes."

This is self evident from the above testimony of Pasquale Martino that he did not have any time for preparation of the trial hearing, and this is a substantial part of the newly discovered evidence, which if it were admitted at the trial hearing, there would have been no necessity for the application of new trial, or if the Court would not had gone through abuses, and irregularities, the jury would have rendered a non suit in favor of the appellant, and against the plaintiff.

POINT XXI.

The Court again failed to hold Jerry Volpe as a perjurer.

The Court again erred in failing to hold Jerry Volpe as a perjurer in open Court of which his Honor, Joseph E. Conlon had full knowledge of the false counter affidavit that had been signed by the said Jerry Volpe in favor of the plaintiff by inducement of the said plaintiff's attorneys.

At page 64 of the transcript says:

"JERRY VOLPE, recalled.

Direct examination by Mr. Mestice:

Q. Will you please tell the Court that subsequent you signed the affidavits with me, did anybody else approach you to sign a different kind of affidavit? A. No.

Q. Never? A. Nobody.

Mr. Mestice: That's all.

Your Honor, may I at this time, put this gentleman on the stand (Indicating Leslie Kohn)? This man being one of the attorneys for the plaintiff-appellee, who together with Frank Masini, had concocted a counter affidavit, which was the cause of the rule being denied for the application of new trial, and which the witness Jerry Volpe, once again denied his signing a counter affidavit, and the same being in possession of Hon. Judge Joseph E. Conlon."

POINT XXII.

The testimony of Henry Stabile should have been sufficient for the Court to exonerate the defendant, and dismiss the contempt proceedings, and on account that the Court cannot hold any one on mere suspicion, because the jury is the sole judge of all facts, and for the reason that the contempt was neither criminal, nor civil, since the interest, and remedies is only between as the plaintiff, and the defendant-appellant.

Henry Stabile was recalled on the stand, notwithstanding the objections raised by the Court, and his *amicus curiae*, on page 77 of the transcript it says—about the middle of the page:

"Q. Why couldn't you see the tank from the top? A. How could I see the tank from the top when the hole is already filled?"

On page 78:

"Q. 'That on the evening of November 26, 1945, I have personally bought kerosene to fill up one of the lanterns.' A. You sent me to buy kerosene; that's all I know. But I did not fill up the lamps.

Q. Just a minute. I have to read on. 'Which was nearly one-half empty, and replaced one of the planks which had been mislaid, for which service the defendant gave me one dollar for my service. This was about 8:45 in the evening.' Is that right? A. I always be glad to go for you the next time, too.

Q. 'That the above plaintiff, Anthony Masi, has been seen by myself in a tavern, drinking in excess.'

Q. Did you say that you saw him in a tavern? A. I seen him in a saloon, but I don't know the man.

Q. You mean you just know him by sight? A. By looking at him, by seeing him."

The defendant-appellant while he was on the sidewalk of his premises, at 14 Sixth Avenue was invited by Jerry Volpe to go up to his house with the above witness Henry Stabile, where he was offered some tea, and at the bottom of page 81 and 82 he said:

"Q. Did he (Jerry Volpe) say he was sorry for what he had said (in Court)? A. I think he did.

Q. Did he say that he was all confused while he was on the stand? A. That's right.

Q. And didn't know what was going on? A. Yes, sir.

Q. Did I tell him that was wrong—what he had done? A. Yes.

Q. Did he say that he would come up in Court again and clarify everything? A. That's right.

Q. Do you say further that everything that I have read in your affidavit is true?

Mr. Laird: Well, now that I object to, because the witness has just testified that it was untrue.

Mr. Mestice: He did not say that.

The Witness: I didn't say that. Well, that ain't true * * *

Q. Which part do you say is untrue? The only thing is that is on the bottom is this, and I will read it to you again. A. Well, Volpe told you the same thing.

Q. The only thing that is on the bottom—paragraph 4: 'That the above plaintiff, Anthony Masi, has been seen by myself in a tavern drinking in excess'. Did you ever see him in a tavern drinking? A. I seen him in a tavern. But what do people do in a Tavern? Don't they drink? They don't go in there just to look around."

At bottom of page 83 of the Transcript it says, and 84:

"Q. Did he say (Jerry Volpe) that the affidavit which was signed by him and his wife was written, typewritten in his own house? A. By the three of us.

Q. The three of you? A. You were the fourth.

Q. You were present, were you? A. Yes.

Q. In other words, when the affidavit was written? typewritten in this house, you were there, Mr. Volpe was there, his wife was there. Is that right? A. Yes.

Q. Did they tell me what to put down? A. Yes.

The Court: Who?

The Witness: The paper was written there, up to Volpe's House.

By the Court: What paper are you talking about?

A. The affidavits.

By Mr. Mestice:

Q. I am talking about the original Affidavits which were signed by you, and Mr. Volpe back into November, 1947—the 25th. A. That's right.

Q. They dictated to put down what ever was written on the affidavits Is that right? A. That's right.

Q. Did they swear to it then and there? A. That's right.

Q. Were you present when they swore? A. Yes."

At this the learned Judge got into a hot debate with the witness and began to shout at each other, on account he could not turn the witness his own way with his intimidating, and threatening attitude, whereupon on top of page 86 the Judge then and there admonishing said defendant's witness said:

"Q. Well, then, how can you answer these questions? A. I got a head; my brains is all right.

Q. I would suggest you use it. Remember, you are under oath in this case, too. A. I know it."

By this time the witness and the Judge had become indignant to each other, and the witness was defiantly opposed to the learned Judge, and his *amicus curiae* who were trying to make him say things which were unfair and untrue. Why, and of what authority has a presiding Judge to shout, and to intimidate witnesses while they are testifying as to their knowledge on meritorious facts? Especially in a contempt proceedings of which there was none to talk about consistently? The Judge knew by this time that his ultimate design should have failed.

Continuing at page 86 thereof:

"By Mr. Mestice:

Q. Before you signed the affidavit was it read to you? A. It was read to me, yes.

Q. Who was present? A. Volpe, his wife, and me.

Q. When Volpe signed the affidavit was the entire affidavit read to him, and to his wife, before they signed it? A. That's right."

At page 88 it says:

"Q. When I was reading aloud was Mr. Volpe holding this paper, and Mrs. Volpe holding this paper before they signed it? A. That's right.

Q. In other words, when I was reading they had a copy in their hands—each of them, is that right? A. In their hands.

By the Court:

Q. How do you know it was a copy? A. Because he made them read it, before they signed it.

Q. Do you know whether or not it was a copy or not, except what Mr. Mestice told you? A. He wrote a copy—a couple of copies—before he gave them the original paper.

Mr. Mestice: May I clarify this, your Honor?

By Mr. Mestice:

Q. They were typewritten, and the same copies came out at the same time from the same typewriter? A. Yes.

Q. In other words, there were three together before I took them from the typewriter, and gave them, to each one of them? Is that the way you want to explain it to the Court, A. That's right."

At page 90 of the transcript it reads:

"Q. I am reading, so you will say wether it is yes or no. 'That on the evening of November 26, 1945, I have personally bought kerosene to fill up one of the lanterns, which was nearly one-half empty, and replaced one of the planks which had been mislaid, for which service the above defendant gave me one dollar for my service. This was about 8:45 in the evening.' That is true, is it? A. Yes.

Q. Therefore, this paragraph was in, was it, or not? A. Yes.

Mr. Mestice: That's all."

Re-direct examination by Mr. Mestice:

(Louis Bourget) said:

"Q. On the day that the accident happened, just by recollection, you saw the man fall and so forth. Now, (the man that fell there) do you recognize that man which fell that evening if you would see him again? A. Yes, but I never saw no one fall in that hole. I picked up a man on the corner of the street, but not in the hole.

Q. The corner of what street. A. Cutler and Sixth Ave.

Q. Now, the man that fell there: Could you point him out to the Court? Who is he? A. Yes, if you make him stand up, I can point him out.

The Court: No. Wait a minute.

Q. Do you see him in Courtroom now? A. Yes.

Q. Could you point him out to me or to the Court? A. He is sitting over there. The fellow with the glasses on.

Q. Is that the man that you picked up? A. That's right.

Q. You helped him out? A. That's right. Maybe he doesn't remember—it is pretty near three years ago—because I had working clothes on.

Mr. Mestice: That's all.

Re-cross examination by Mr. Laird:

Q. After the time that you picked this man up, as you have described, how long was it before you saw him again? A. Oh, I couldn't judge right away, how long it was. Maybe four or five months after. Every once in a while I see him again.

Q. Did you recognize him when you saw him? A. I recognized him but I didn't pay any attention. I didn't think there was going to be anything about it, because when I picked him up he said he was all right; he wasn't hurt.

Q. At the time you picked this man up who said he wasn't hurt— A. That is what he said.

Q. Will you please listen to my question? At the time you picked this man up, who said he wasn't hurt, did you know then, who he was? A. No, I didn't know him then.

Q. When did you find out who he was? A. I didn't find out until after the trial.

Q. The first trial? A. That's right.

Mr. Laird: That's all."

The Court erred in failing to discontinue the contempt proceedings of which he was conscious that there was nothing of which he had substantial reasons to believe that the affidavits, as introduced, were not so submitted to the Court in good faith, unless his ultimate intention was one to destroy the defendant's newly discovered evidence, regardless as to what said defendant had proved to the full satisfaction of the Court.

At page 117 says:

"The Court: I understand that Mrs. Volpe is very ill and that she is to have a baby within, apparently, a short time. Under the circumstances, I will not require her to come to Court * * *

What about Mr. Harrington? * * *

Mr. Mestice: It might be helpful, your Honor.

The Court: Did you subpoena him?

Mr. Mestice: I have not subpoenaed him.

The Court: Why not?

Mr. Mestice: Well, for the reason that I did not think that he could possibly be here and represent me, and since he could not represent me, I felt I didn't think his testimony would be of value or that he would be in Court to testify, because I never expected that the Volpes would turn out to be hostile. And the affidavits that they really signed—I did not believe them, at the same time."

At page 120 says:

"WILLIAM R. MESTICE, sworn:

The Witness: May I at this time, Your Honor, request that the petition of the *amicus curiae* be dismissed?

The Court: Wait a minute. You are on the stand to testify. Do you desire to testify?

The Witness: Yes.

The Court: All right.

The Witness: That I am familiar with the above proceedings, instituted by the petitioner, John A. Laird, Esq., as *amicus curiae,* in the above matter, but I fail to understand the reason for his rule to show cause, and the unreasonableness of such a proceeding, which I believe, it has no precedency. * * *"

At page 121:

"That the affidavits of Jerry Volpe, Mrs. Ann Volpe, his wife, and that of Henry Stabile were submitted to this Court on the application for a new trial, which was denied on account of one counter-affidavit submitted by the defendant's attorney, who had failed to serve * * *

Well, then as to the testimony which has been given by the Volpes, it may be set aside on account of their inconsistency, and unreliability, and I would not want to have said affiants to testify at any trial hearing, since their character is somewhat questionable, as to render them unworthy of credence, but I verily did believe them—and I still believe it—that the affidavits in question submitted by them, and sworn to, by them, according to law, by all the Volpes—Jerry Volpe and Ann Volpe, his wife, are true, and should be given.

Mr. Laird: If your Honor please, may I interrupt and say that it seems to me that the conduct * * *

The Witness: Your Honor, I think I am under the duty to tell the Court my impression received by the affiants, what of the story they were telling me—I believed them to be true. I didn't go up to them; they invited me to go up to their house. And I did take their story as they told me. * * * "

At page 123:

"The Witness: That the said material facts contained in the said affidavits of the said Volpes are meritorious, and worthy of credence, because I verily believe them to be true, because, and a fortiori, all of the statements set forth in the Volpes' affidavits, are reaffirmed, and somewhat corroborated by the affidavit of his older brother, Anthony Volpe, after that his brother Jerry Volpe had made a counter-affidavit at the request of the plaintiff's attorney, or associates if any.

"That Jerry Volpe and Mrs. Ann Volpe, his wife, affidavit, was typewritten and dictated, then and there by the said above said Volpes, in his own home, at their request, and then and there sworn thereto, in the presence of Henry Stabile.

That Anthony Volpe, having heard the preceded, adverse testimony of his brother Jerry Volpe, the herein affiant, then and there, very readily made an attempt to repudiate his affidavit, in order to save his brother from any possible legal responsibility, but, however, notwithstanding, that all of the statements of facts set forth, on both of the said affidavits, the defendant herein did believe, and still believes them to be true, their being sufficient corroboration by the said Volpes, notwithstanding the fact that they were repudiated, as a whole, or in part, their own affidavits.

That the above plaintiff, Anthony Masi, contended at the trial hearing, that he had fallen in the front of my said premises, No. 14 Sixth Avenue, City of Newark, County

of Essex, State of New Jersey, but that said contention is very absurd, and insincere, on the ground that he was not injured on the said premises, owned by me, the defendant herein, and that he could never have fallen in front of said premises, for the reason that said locality was completely barricaded, and protected by planks, and beams, with lights affixed thereto, and which is fully substantiated by the affidavits of the said Henry Stabile, Pasquale Martino, by the said Volpes, by Mrs. Antoinetta O'Rouke, and Mrs. Bourget, and Annunziato Della Palma, who have so testified at the trial hearing.

"That the affidavit of Louis Bourget, and his testimony in this Court, has revealed that the plaintiff, Anthony Masi, has not fallen in front of defendant's premises, but at the pool-billiard, and bowling alley brick porch, steps, and parapet thereto, of the building situated at Cutler Street, Sixth Avenue corner, City of Newark, County of Essex, New Jersey,

"That said porch has no lights, and, consequently, it is very dark in the night time, and which it may be conceded to have been the proximate cause of the injury sustained by the said plaintiff, Anthony Masi, more fully described in the affidavit of the said Louis Bourget, and narrated by his testimony in open Court, and duly cross-examined by the said Honorable John A. Laird, as *amicus curiae*, and by direct questioning, duly propounded by the Court.

"Wherefore, the defendant, herein, respectfully requests that this Honorable Court quash the petition of the Honorable *Amicus Curiae*, John A. Laird, and to dismiss the rule to show cause, and this Honorable Court, may *sua sponte*, grant such other, and further relief, as it may be just and proper in the premises, and as to proceedings, and legal rights of the above defendant."

I have attached my jurat, which reads that:

'William R. Mestice, being duly sworn according to law, upon his oath deposes and says:

1. That I am familiar with all proceedings heretofore being had, and that I am the above defendant,

2. That the above answer, defense, and statements set forth, I verily believe them to be true, except as to informations from without, which I also believe them to be true, and that all of the filed affidavits with this Court, have been submitted in good faith, and for the purpose so that my legal rights be vindicated.

I respectfully submit it to Your Honor.'

The Court: Do you have anything further?

The Witness: I have not Your Honor. * * *"

The Court erred at this point not to dismiss the contempt proceedings although he was fully convinced that there was not a scintilla of evidence whereby he could have held the defendant in contempt of disrespect to the Court, or of any offense which had been made in the presence of the Court, or that the affidavits which had been filed with the Court, had been filed in bad faith by the appellant, and the court was fully convinced that said affidavits contained facts which were meritorius, and a new trial should been granted without prejudice, or that the Judge should have dismissed the plaintiff's complaint, based on the newly discovered evidence, or on other well settled laws which have heretofore been mentioned; instead of deciding to the prejudice, and detriment of the above defendant-appellant.

Conclusion.

That the contempt proceedings should be dismissed because the affidavits submitted were not contemptuous as civil, nor as criminal.

That false affidavits—on the contrary—were procured by the plaintiff-respondent and his attorneys Frank G. Masini, and Leslie Kohn.

That the fact remains that the rights of a defendant to a jury, is inviolable, in respect to a fair Administration of Justice.

That the presiding Judge Joseph E. Conlon is legally disqualified according to Rule.

2:8-2 (d):

> "If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt. If the substance of the charge is a violation of an order or judgment of the Court, the judge who made the order or judgment is likewise disqualified."

2:8-3:

> "The Court may try the issue without a jury, in its discretion, but this rule shall not supersede any statutory right to trial by jury."

That a defendant cannot be punished for contempt for presenting a motion for a new trial, when I acted in good faith, and in my own interest, and the filing of the motion was necessary to protect my own interest in the cause.

There is no evidence to show that the motion for a new trial contained any false, unlawful, malicious, impertinent, scandalous, or malicious charges which were objectional to a judge.

That here—on the contrary—there was a professional misconduct on the part of the *amicus curiae*—John A. Laird—and of the presiding Judge—Hon. Joseph E. Conlon—requiring a severe censure, and they should be subjected to a severe legal discipline, for having unjustly deprived the defendant-appellant of his legal rights in the domain of reason.

The dignity and authority of the Court has not been challenged, nor offended, by the submission in good faith, of affidavits which I believed to be true.

That the mere filing, or presentation in good faith of an affidavit, or motion, in a respectful language, and in a respectful manner, does not constitute, contempt, particularly where prejudice, or bias is recognized by statute, as ground for disqualification.

And if this Court finds that Judge Conlon planned, and guided his *amicus curiae*—Laird—he is subjected to a severe professional discipline, and said John A. Laird is in *pari passu,* unjustified to evade the consequences of a disciplinary measure, because they are both members of the bar, and officers of the Court, and should be found guilty of the various acts of misconduct which renders them unfit to longer continue in the practice of a profession to whose care, and custody, are constantly intrusted the rights of the public, and of individuals.

There is sufficient evidence leading to the conclusion that both have acted in bad faith, and this is evidenced by the fact that their misconduct is manifested by their relentless persecution, malicious in nature, which are involved in these proceedings, which amount to a legal fraud upon the Court, and upon the complaining defendant, in a very disrespectful and wanton manner, and in dis-

regard to their solemn placed responsibility, in the Administration of Justice; and this should disqualify them from further acting as attorneys at law, and thus be punished for their mal-practice, and frauds, and abuses in the Administration of Justice.

There has been misbehavior in their professional capacity as members of the Court. An investigation of the hearings, and rulings and orders, and capias involved, would reveal violations of human rights and privileges, of the enacted laws of the State of New Jersey, and of the United States Constitution, as to jurisdiction.

Judge Conlon's Court had an atmosphere of total terror-technique, diabolic in nature, in full force, against the testifying witnesses, under which pressure they gave ground as a whole, or in part, with a firing reluctance, and thus repudiated the aggressor's threats and intimidations, together with untold promises, which are repugnant to society, and against the public policy of this State.

In the future an affiant would not dare to sign an affidavit in a civil court action. Therefore, Judge Conlon has carried out, not the Administration of Justice, but a wantoned, pernicious persecution, of which he should be tried, and dethroned of his official duties, and divested of his judicial administrative capacity in the Courts of New Jersey. Frankly, said Judge Conlon, has manifested a dominating, aggressive attitude and personality over the witnesses and the appellant; and this appellant verily believes to be his duty to advise and to inform this Honorable Court of the malicious prosecution to which he has been subjected watonly.

Lawyers have declined to represent me because they had no personal courage to combat my case,

fearing Judge Conlon's reaction, because there was a danger of incriminating themselves.

The coerced testimony of the affiants has been one of fear and anxiety to reed themselves from the affidavits which Judge Conlon and his *amicus curiae*—John A. Laird—was out to suppress, in a clumsy procedure, and hearing of his manufactured contempt, which in fact and in law, it is not civil, and neither a criminal one.

Civil Contempt consists in failing to do some thing ordered to be done by a Court in a Civil Action, for the benefit of an opposing party therein.

Criminal Contempt is an offense against society, while a civil contempt is rather an infringement on the rights of a private person. (Corpus Juris Secundum, p. 8 of Contempt.)

Nota Bene:

That the transcript of record, as certified by the Hon. Judge Joseph E. Conlon, is incomplete, and partly false, in that it states that:

> "I, Joseph E. Conlon, Judge of the Court of Common Pleas, in and for the County of Essex and State of New Jersey,
>
> Do HEREBY CERTIFY and hereby return to the Supreme Court of Judicature of the State of New Jersey the Petition of Appeal and all proceedings touching the conviction and judgment in the matter of Criminal Contempt of Court of William R. Mestice, an Attorney at Law of the State of New Jersey.
>
> IN WITNESS WHEREOF, we have hereunto set our hands and Official Seal the 12th day of August, 1948.
>
> Signed: JOSEPH E. CONLON,
> Judge of the Court of Common Pleas,
> Essex County, New Jersey.
> Russel Gates, Clerk."

(Seal)

That the statement of Judge Joseph E. Conlon, that William R. Mestice, being an Attorney at Law, is false, and that as to "the return to the Supreme Court of New Jersey the Petition of Appeal and all proceedings touching the conviction of Criminal Contempt of Court" is equally false due to the fact that he has failed to surrender voluntarily all of those papers which are touching his Criminal Contempt, etc.

That the trial was conducted in an unfair manner, and prejudicially. And justice does not begin with prejudices. It admits free discussion, and without a psychological torture of witnesses' minds who are legally entitled to the facility of their free thinking, and without coercion on the part of the presiding judge, to offset their believing way of thinking, as to their knowledge of the existing evidenciary facts, subject to cross examination, with a sense of rectitude and without prejudice, or partiality.

Wherefore the appellant, in the light of the aforegoing demands that the above charges be prosecuted, that the decisions of the Courts below be reversed as against the respondent, and in favor of the appellant to the end that his equitable and legal rights, and privileges be protected, and restored in the status *quo ante*, and the petition to void the sale of appellant's real estate be so ordered as requested therein.

Respectfully submitted,

WILLIAM R. MESTICE.

Dated: January 19th, 1950.

APPENDIX I.

Letter to Judge Joseph E. Conlon.

April 27th., 1948

Hon. Joseph E. Conlon
Judge of Essex County Court of Common Pleas
Newark, N. J.

Re: *Masi* vs. *Mestice*—84192—564.

Honorable Sir:

At the informal hearing, in Your Chamber, I have noticed an impatient air of expression in the above matter, on Your part; and I verily believe that I owe Your Honor an apology, if I have, unintentionally, in any way hurt Your dignified personality.

All men are bound to err, therefore, I am no exception; Your Honor may—on the other hand—realize my position in the community, in that the above plaintiff wants to sell my property to satisfy himself, to benefit at my expense, wherein I have put in all of my life savings, so that I may become a destitute.

The affidavits, submitted to Your Honor, for Your consideration, very clearly indicate that the above plaintiff has not suffered the complained injury in the front of my property, at 14 Sixth Avenue, Newark, N. J., but at the Bowling Alley & Billiard, at the stoop parapet, and steps, of the said place, and which is near the corner of Sixth Avenue and Cutler Street, and only a half block from my said property.

That the said complainant,thereupon, has proceeded to the next corner—Sixth Avenue and Stone Street—has gone into the Tavern of one

Vallario, and after being there for about fifteen minutes, he was taken by somebody, in an automobile, presumably radio-cops, to his home, and which information I may not be able to prove on account that the gang of said tavern may physically abuse those that would interfere in the above matter.

It has been for this reason that Jerry Volpe has given a contra affidavit to the above plaintiff; and that Your Honor may readily integrate the affidavits submitted to Your Honor that there is sufficient corroboration as to the above stated facts, in that the plaintiff was drunk, and that he has fallen at the place as heretofore indicated.

That the inclosed photograph is the stoop, with a parapet, and brick steps, whereat the complainant was injured, and which place is very dark at night, it having no lights whatever which can be seen thereto.

I have humbly pleaded to Your Honor to grant me the privilege of a new trial, which Your Honor may reconsider without prejudice, whereupon, I shall engage a better trial attorney, than myself, for the purpose thereof; and I verily believe that if I had all of the newly discovered evidence at the trial hearing, the judgment would have been rendered in my favor; and this I believe very sincerely.

Respectfully Yours,

Wm. R. Mestice.

Dated: April 27—1948.

Answer and Jurat.

To Honorable Joseph E. Conlon, Judge of Essex County Court of Common Pleas:

MAY IT PLEASE YOUR HONOR:

The defendant, William R. Mestice, respectfully shows unto your Honor:

1. That I am familiar with the above proceedings, instituted by the petitioner, John A. Laird, Esq., as *amicus curiae,* in the above matter, but I fail to understand, the reason for his rule to show cause, and the unreasonableness of such a proceeding which, I believe, it has no precedency.

2. That I have respectfully, and in good faith, submitted to this Honorable Court, affidavits, so that a trial *de novo* could been granted, and for the purpose thereof, I could been exonerated from a liability, of which I am not at fault, this being based on newly discovered evidence, which are meritorious, and on account that the above plaintiff, Anthony Masi, has not suffered, his pretended injuries, in the front of my premises, at 14 Sixth Avenue, in the City of Newark, County of Essex, State of New Jersey.

3. That since this Honorable Court has denied said application for a new trial, this answering defendant, had no other alternative, but to appeal to the Supreme Court, for the sole purpose to vindicate his legal rights, as against the above said plaintiff.

4. That, thereupon, a notice of appeal has been duly filed, with the Honorable Clerk of this Court, and a copy thereof, being duly served upon the above plaintiff's attorney of record, and surety bonds have been duly submitted to this Court, ac-

cepted, and filed, for the purpose thereof, so that I could proceed with the said appeal, as provided by law, and according to statutory provisions.

5. That, with all due respect, and veneration to this Honorable Court, I am of the humble opinion, that since the appeal is pending, the execution on the verdict has been stayed, by order of this Court, and surety bonds have been filed, for the purpose of the said appeal, this Honorable Court has, no longer, any jurisdiction on this matter, on the ground of said pending appeal in the said Supreme Court of New Jersey, and, therefore, the petition of the said *amicus curiae,* Esq., should fail, and quashed with prejudice, both for lack of jurisdiction, and on the ground that all of the affidavits, filed with this Honorable Court, have been so filed with sincerity, in good faith, and because I verily believed, and still believe them to be true.

6. That the Honorable *amicus curiae,* John A. Laird, and Mr. Troy, an investigator from the Prosecutor's office, have created an atmosphere of an involuntary fear, on the part of the affiants, who were willing, and expected to testify only at the time of the trial hearing, if the same would been granted by this Honorable Court, and be cross examined, in due time, by the adverse attorney for the above plaintiff, without fear, or intimidation, by any one, directly, or indirectly.

7. That the affidavit of Jerry Volpe, Mrs. Ann Volpe his wife, and that of Henry Stabile, were submitted to this Honorable Court, on the application for a new trial, and which was denied, on account of one counter-affidavit, submitted by the defendant's attorney, who had failed to serve, said counter-affidavit, unto me, prior to the return

day of the said application for a new trial, therefore, since said counter-affidavit, was never submitted, nor served upon the defendant, said counter-affidavit should not been admitted, nor been considered for the purpose thereof.

8. That for the reason set forth, any testimony which has been made, or that it may be offered, may be set aside on account of its inconsistency, and unreliability; and the defendant herein, would not want to have said affiant to testify on any trial hearing, since his character is somewhat questionable, as to render him unworthy of credence, but that I verily did believe him, and I still believe that the affidavit in question, which was sworn and subscribed according to law, by the said Jerry Volpe, and Ann Volpe, his wife, is true, and should be given the full consideration, and its value, as to the contents of the material facts relating thereto, in the above matter, and for the cause thereof.

9. That the said material facts, contained in the said affidavit of the said Volpes, are meritorious, and worth of credence, because I verily believe them to be true, because and a *fortiori,* all of the statements set forth in the Volpe's affidavits, are re-affirmed, and somewhat corroborated, by the affidavit of his older brother, Anthony Volpe, whose affidavit was made, and duly sworn, by the said Anthony Volpe, after that his brother Jerry Volpe, had made a counter-affidavit at the request of the above plaintiff's attorney, or associate, if any.

10. That Jerry Volpe, and Mrs. Ann Volpe, his wife, affidavit, was typewritten as dictated, then and there, by the above said Volpes, in his own home, at their request, and then and there sworn thereto, in the presence of Henry Stabile.

11. That Anthony Volpe, having heard the preceded, adverse testimony of his said brother Jerry Volpe, the herein affiant, then, and there, very readily, made an attempt to repudiate his affidavit, in order to save his brother from any possible legal responsibility, but, however, notwithstanding, that all of the statement of facts set forth on both of the said affidavits, the defendant herein did believe, and still believes them to be true, there being sufficient corroboration by the said Volpes, notwithstanding the fact that they have repudiated, as a whole, or in part, their own affidavits.

12. That the above plaintiff, Anthony Masi, contended, at the trial-hearing, that he had fallen in the front of my said premises, No. 14 Sixth Avenue, City of Newark, County of Essex, State of New Jersey, but that said contention is very absurd, and insincere, on the ground that he was not injured on the said premises, owned by me, the defendant herein, and that he could never had fallen in front of said premises, for the reason that said locality was completely barricated, and protected by planks, and beams, with lights affixed thereto, and which is fully substantiated by the affidavits of the said Henry Stabile, Pasquale Martino, by the said Volpes, by Mrs. Antonetta O'Rouke, and by Mrs. Bourget, and Annunziato Della Palma, who have so testified at the trial-hearing.

13. That the affidavit of Louis Bourget, and his testimony, in this Court, has revealed that the plaintiff, Anthony Masi has not fallen in front of defendant's premises, but at the pool-billiard, and bowling-alley brick porch, steps, and parapet thereto, of the building situated at Cutler Street,

Sixth Avenue, Corner, City of Newark, County of Essex, New Jersey.

14. That said porch has no lights, and, consequently, it is very dark in the night time, and which it may be conceded to have been the proximate cause of the injury sustained by the said plaintiff, Anthony Masi, more fully described in the affidavit of the said Louis Bourget, and narrated by his testimony in open Court, and duly cross examined by the said Hon. John A. Laird, as *amicus curiae,* and by direct questioning, duly propounded by the Court.

WHEREFORE, the defendant, herein, respectfully requests this Honorable Court to quash the petition of the Honorable *Amicus Curiae,* John A. Laird, and to dismiss the rule to show cause, and this Honorable Court, may, *sua sponte,* grant such other, and further relief, as it may be just, and proper in the premises, and as to proceedings, and legal rights of the above defendant.

Respectfully submitted,

WILLIAM R. MESTICE.
William R. Mestice.

Answer and Jurat.

Jurat.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

WILLIAM R. MESTICE, being duly sworn according to law, upon his oath deposes, and says:

1. That I am familiar with all proceedings heretofore being had, and that I am the above defendant.

2. That the above answer, defense, and statements set forth, I verily believe them to be true, except as to informations from without, which I also believe them to be true, and that all of the filed affidavits with this Court, have been submitted in good faith, and for the purpose so that my legal rights be vindicated.

WILLIAM R. MESTICE.
William R. Mestice.

Sworn and subscribed to before me }
this 4 day of June, A. D., 1948. }

JOSEPH NUSSBAUM,
Notary Public of N. J.
My Commission expires Mar. 18, 1951.
(Seal)

Petition and Jurat.

To Honorable Joseph E. Conlon, Judge of Essex Common Pleas:

MAY IT PLEASE YOUR HONOR:

William R. Mestice, the above defendant, respectfully shows unto your Houor:

1. That last Friday, June Fourth, towards the end of the hearing of that day, I heard Your Honor saying that you were pleased as to all the affidavits submitted to the Court, but that it needed a little more clearance on the Volpes affidavits, and this I have done on the following Monday, on the Eight day of June, to the full satisfaction of the Court, and by proving to the Court that the affidavits of Henry Stabile, and of the Volpes were typewritten at one time, and never taken out from the typewriter, as to put in additional facts, as contended by the said affiants, and this was fully proved by the testimony of Mrs. Corrine Mahanna, a competent, expert public stenographer, who has been such since, or about the year of 1918 to date, and still being a public stenographer.

2. That at the closing of said testimony Your Honor said to be suspicious of the affidavits, and testimony of Louis Bourget, one of the affiants, on the ground that he is one of the tenants of mine, and therefore you are of the opinion that his affidavit may be false, and for which suspicion you found me, your petitioner, to be guilty of contempt of Court.

3. That your petitioner, William R. Mestice, hereby respectfully shows unto Your Honor, that said affidavits of Louis Bourget, Esq., are true, as to my knowledge, and moreover, I made adequate

inquiry as to their veracity, before the same were submitted to Your Honor, and

4. That to be certain of his statement of facts, as set forth in the affidavits in question, I have personally investigated his statements, and this was also personally done by United States Marshall Hubert Harrington, who was fully convinced that all of the affiants in the above matter, were true, to his own satisfaction.

5. That said Louis Bourget, Esq., at the time of the excavation, and installation of the oil fuel tank, he was employed at night, as mechanic, so I have personally investigated as to whether he was working that night or not; and true enough the company has looked at their records, and it has found, and disclosed the fact that the said Louis Bourget, had not reported to work on that night, which was on Monday the 26th day of November, A. D. 1945, and which is the evening of the accident being witnessed, and so set forth in the affidavit of the said affiant, Louis Bourget.

WHEREFORE, I pray unto Your Honor, that I be graced with an opportunity to further prove unto Your Honor, the veracity of the said affidavit of Louis Bourget, Esq., by subpoena of the records of the said firm, to the end that my innocence, and good faith be established, and to clear Your mind of any suspicion, and to the end that my good name, and reputation will retain its place in society.

Respectfully submitted,

WILLIAM R. MESTICE.
William R. Mestice.

Dated: Ninth of June, 1948.

Petition and Jurat.

Jurat.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

WILLIAM R. MESTICE, the above defendant, being duly sworn according to law, upon his oath deposes and says:

1. That I am familiar with all proceedings in the above matter, and that all facts set forth in the above petition are true, and that this affidavit, and the said petition is submitted in good faith and for the purpose to clarify to the Court any doubt as to the veracity of the affidavits which are before the Court in the above matter, and to the end

2. That His Honor, Judge Joseph E. Conlon, be cleared of the suspicion which he has of one of the affiants, Louis Bourget, Esq., in that since he happen to be one of my tenants, he is of the opinion that his affidavits are false, and therefor contemptuous on the part of the defendant, and of which the herein defendant verily believe that said affidavits are true, and that the Court can be satisfied by producing additional proofs, as set forth in the above petition, for the purpose thereof.

WILLIAM R. MESTICE.

Sworn, and subscribed to before me }
this 9 day of June, A. D., 1948. }

JOSEPH NUSSBAUM,
Notary Public of N. J.
My Commission Expires March 18, 1951.

(Seal)

Rule to Show Cause.

This matter being opened to the Court, by the above defendant, William R. Mestice, and after reading and considering his "Petition & Jurat", upon which this Rule to Show Cause is hereby granted, it is on this day of June, 1948,

ORDERED, that John E. Laird, as *amicus curiae*, show cause before this Court, on the day of June, 1948, why the above matter should not be reopened, and additional testimony, and proofs, be admitted before me, Honorable Joseph E. Conlon, Judge of the above Court, before sentence be given in the above matter, as prayed by the above said defendant; and it is

FURTHER ORDERED, that a copy of this order be served by the defendant unto the said Laird within from the date hereof, at his office, 17 Academy Street, Newark, N. J.

Let this Rule be Entered.

.....
Judge of E. C. C. of C. Pleas.

Affidavit of Pasquale Martino.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

PASQUALE MARTINO, of full age, being duly sworn according to law, upon his oath deposes and says:

1. That I am familiar with the affidavit signed by me on the First day of December, 1947, concerning the above case, which was made at my request, and so dictated, and then and there duly sworn at the request of the above defendant, at my home, and which was typewritten on one full page, containing paragraphs 1, 2, 3, 4, 5, inclusive, and which statements I hereby reaffirm.

PASQUALE MARTINO.

Sworn and subscribed to before me }
this 1 day of June, 1948. }

MICHAEL LISS,
Notary Public of N. J.

(Seal)

Filed: June 4, 1948.
By Order of Court (Judge Conlon).

Affidavit of Henry Stabile.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

HENRY STABILE, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. That I am familiar with the above matter, and proceedings, relating thereto, in that I have signed an affidavit on the 25th day of November, 1947, concerning the above case; and which was typewritten by the above defendant, William R. Mestice, at my request, in the presence of Jerry Volpe, and Mrs. Ann Volpe, his wife, at their home, No. 12 Sixth Avenue, City of Newark, County of Essex, State of New Jersey.

2. That said affidavit was dictated by myself, and then and there duly sworn, at the request of the said defendant, William R. Mestice, in the presence of the said Volpes, and which affidavit consisted of one page containing paragraphs 1, 2, 3, 4, inclusive, and which statements I hereby reaffirm.

3. That on the 25th day of May, 1948, while the said defendant, William R. Mestice, was standing in the front of the said premises, Jerry Volpe, who was in my company, invited the said defendant, Mestice, to go up into his house, who, then and there accepted his invitation, and a cup of tea was offered to him, and which it was accepted by the said Mestice.

4. That an open discussion was had, in reference to the above case, and the testimony put up by the said Jerry Volpe, who said that he was totally confused, and did not know what was going on, nor what he was talking about, and that he was sorry for the incident, and of what he had

testified in the above matter, last Friday, May 21st, 1948.

5. That I, the deponent, thereupon, told him that what he had testified, against the said defendant was wrong, moreover, I reminded him that the affidavit which was signed by him, and his wife, the Volpes, was typewritten, by the above defendant, Mestice, in his presence, his wife's presence; and my presence; whereupon, the said defendant, Mestice, showed him a true copy of the affidavit, which, Jerry Volpe read it from top to bottom, and said that he knew the whole thing by heart, and that no changes were made, nor could been made, but that he did not care to go to Court any more, because of fear, and on account of not being paid for his time.

That this affidavit is made in good faith for the purpose to reaffirm my affidavit of November 25th, 1947, which consisted of one full page, and to further affirm that the affidavit signed by Jerry Volpe, and Ann Volpe, his wife, was so dictated by them, and typewritten by the said defendant, William R. Mestice, in my presence, and which affidavit was written on one full page, and then and there sworn, and signed by the said Jerry Volpe, and Ann Volpe, his wife.

HENRY STABILE.

Sworn and subscribed to before me this 26 day of May, A. D. 1948.

BEN J. D'AVELLA,
Notary Public of New Jersey.
My Commission Expires 5/2/52.

(Seal)

Affidavit of Louis Bourget.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

The undersigned being duly sworn according to law upon his oath deposes and says:

1. That I am familiar with the affidavit signed by me on the 21st day of April, 1948, referring to the above case, which I requested the above defendant, William R. Mestice, to prepare the same in a legal form relating to statements as contained therein, and which I hereby reaffirm to its entirety.

2. That the said affidavit was duly sworn as prescribed by law, as to execution, and attestation, as requested by me, before a Notary Public of New Jersey, which was typewritten by the above defendant William R. Mestice, according to statements, and information furnished by me, to the said above defendant, William R. Mestice, which were approved by me, and which I hereby reaffirm, as to the whole of paragraphs numbered as 1, 2, 3, 4, 5, 6, thereto.

LOUIS BOURGET.

Sworn and subscribed to before me }
this 25 day of May, A. D., 1948. }

BEN J. D'AVELLA,
Notary Jublic of New Jersey.
My Commission Expires 3/5/52.

(Seal)

Filed June 4, 1948.
By Order of the Court (Judge Conlon).

Affidavit of Henry Stabile.

STATE OF NEW JERSEY, } ss.:
COUNTY OF ESSEX. }

HENRY STABILE of full age being duly sworn according to law, on his oath deposes and says:

I live at 46 Crane St., Newark. About 3 or 4 weeks ago William Mestice who owns #14 - 6th Ave. came to see me about the job he was doing on 14 - 6th Ave. in 1945, and about someone falling in the hole on the sidewalk. I told him I did not know anything about any accident. Mestice then told me to sign a statement which he prepared and which I signed. I never bought any kerosene nor saw any one fall, but he told me it would help his case if I told that kind of a story. I don't know Anthony Masi and have never seen him. The story in the statement signed by me is not true but I signed it not realizing what I was signing. I do not know how to read.

/s/ HENRY STABILE.

Subscribed and sworn to }
this 16th day of Dec., 1947. }

FRANK G. MASINI,
A Master in Chancery of N. J.

Witness: PHILIP J. PIZZUTO.

Affidavit of Jerry Volpe.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

JERRY VOLPE, of full age being duly sworn according to law on his oath deposes and says:

I live at 16 - 6th Ave., Newark, N. J. with my wife Ann. About a week or so ago, one William Mestice who owns No. 14 - 6th Ave. came to see me and asked me if I remembered the oil tank job at 14 - 6th Ave. and I told him I did because I had helped with the job. He then had my wife and me sign a piece of paper on which there was nothing written except the upper part of the paper. I did not state that I saw anybody hurt or drunk. In fact, such a statement is untrue. When I realized later that Mestice had written things in the statement which I did not tell him he said he would pay me for my troubles because I told him I would not lie for him.

JERRY VOLPE.

Subscribed and sworn to before me }
this 13th day of December, 1947. }

JOSEPH E. MASINI,
A Notary Public of New Jersey.

Letter from Anthony Volpe.

March 10, 1948.

Dear Mr. Mestice
314 Waverly Avenue
Newark, N. J.

This is to inform you that I have read about the Sheriff sale of your properties on 6th Ave., Newark, N. J.

Please be advised that on the evening of the accident, claimed by Anthony Masi, I had come out from the movies about 8:30 P. M. on November 26, 1945, and I was home about 9 o'clock. I went up stairs, but my brother was not home, and then I went down stars again, and later on, I noticed the said Masi mumbling to himself, and was talking to my brother then walked to him and asked him what was wrong with him.

Then my brother and his wife came out from their automobile, and we told him to go to the drugstore, he being drunk, and my brother wanted to take him home with his auto, but he refused any help, and went home by himself.

If you can use me as your witness I will come over to Court at anytime because I don't believe that Mr. Masi was not hurt at all, because if he was hurt I would had gone to the drug store to call an ambulance for him, or that I would take him to the hospital myself with my brother's car. It looked to me as though he did not wanted to be bothered at all, and so he walked away.

Very truly yours,

ANTHONY VOLPE.

Ordered filed June 4, 1948.
By Order of Court (Judge Conlon).

APPENDIX II.

Affidavit of Jerry Volpe and Ann Volpe.

STATE OF NEW JERSEY, } ss.:
COUNTY OF ESSEX. }

The undersigned, being duly sworn according to law, and of full age, upon its oath, depose and say:

1. That I am familiar with the excavation, and the lowering of an oil fuel tank, which took place on, or about November 15th, 1945, and which work was completed in, or about the period of two (2) weeks, in the front of 14 Sixth Avenue, in Newark, N. J.

2. That within said period time, I have noticed that said place was barricated, with two (2) or more havy beams or planks, which were accross the sidewalk, as aforesaid, at 14 Sixth Avenue, Newark, New Jersey, with a lantern light on both ends thereto.

3. That on November 26, 1945, about the hour of, or about 9:30 P. M., I have personally seen a man in the front of said premises, who claimed that he was hurt against said plank, and that he had just come out from a tavern.

4. That I made suggestion he should go to the drugstore and to get something, so that he might been releaved of his drunkness, on account that his breath was heavy, with an ordor of intoxicating beverage, and thereupon left him go by himself, having refused any assistance on my part;

and that the man in question is the above named plaintiff.

JERRY VOLPE,
ANN VOLPE.

Sworn and subscribed to before me this 24th day of November, 1947, A. D.

WILLIAM R. MESTICE,
Notary of N. J.—Real Estate,
314 Waverly Ave., Newark, N. J.
My Commission Expires Dec. 4, 1951.

(Seal)

Filed Dec. 3, 1947.
Russell C. Gates, Clerk.

Affidavit of Henry Stabile.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

HENRY STABILE, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. That on or about November 14, 1945, an excavation was made in front of 14 Sixth Avenue, Newark, New Jersey, and within two days, an oil fuel tank was lowered therein, and buried therein at the same time with soil which covered it up even with the sidewalk.

2. That I have further noticed that planks, or heavy beams were laid accross, about three (3) feet in hight, with a lantern at both end, during the night time, every night.

Affidavit of Pasquale Martino.

3. That on the evening of November 26, 1945, I have personally bought kerosine to fill up one of the lanterns, which was nearly one helf empty, and replaced one of the planks which had been misslaid, for which service the above defendant gave me one dollar for my service. This was about 8:45 in the evening.

4. That the above plaintiff, Anthony Masi has been seen by myself in a tavern drinking in excess.

HENRY STABILE.

Sworn and subscribed to before me this 25th day of November, 1947, A. D.

WILLIAM R. MESTICE,
Notary of N. J.—Real Estate
314 Waverly Ave., Newark, N. J.
My Commission Expires Sept. 16, 1951.

(Seal)

Filed Dec. 3, 1947.
Russell C. Gates, Clerk.

Affidavit of Pasquale Martino.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

The undersigned, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. That I am familiar with the excavation, and the lowering of an oil fuel tank made in the front of premises at 14 Sixth Avenue, Newark, New

Jersey, which took place on, or about November 15, 1945.

2. That said work was done by one Pressie Squire, with the help of two more men engaged by himself, who were to make a complete job, as soon as the inspection had been passed.

3. That on or about November 17, 1945, I have personally filled up—the said excavation—with soil, or dirt, to the top, making the same even with the sidewalk surface; this I have repeated every other day.

4. That on or about November 23rd, 1945, I have personally covered—said sidewalk surface—with the replacement, and re-setting, the same large-flagstones, which were laying alongside the said premises.

5. That, every evening, I have placed across, the said sidewalk, planks, or heavy beams, with lanterns on both ends; and this I have also done it on the evening of November 26th., 1945, and thereafter, until said Pressie Squire, had completely removed the excavated soil therefrom.

PASQUALE MARTINO.

Sworn and subscribed to before me this
First day of December, 1947, A. D.

WILLIAM R. MESTICE,
Notary of N. J.—Real Estate,
314 Waverly Ave., Newark, N. J.
Com. expires 12/4/51.

(Seal)

Filed Dec. 3, 1947.
Russell C. Gates, Clerk.

Affidavit of Mrs. Antoinette O'Rouke.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

ANTOINETTE O'ROUKE, of full age, being duly sworn according to law says:

1. That I have written the letter dated November 25, 1947:

"November 25, 1947.

Dear Mr. Mestice

This is to advice you that I read in the paper. About the case of Masi against Mestice. In that there was a berdict against you fore two thousande dollars. $2,000.00

I cant see how this could been done. I remember that there were planks on boath ends of the excavation where the oil tank was placed in. I further remember that this happened about November 15, 1945 And that therewere also lantern lights.

That same condition existed on I now November 26, 1945 after 8 P. M.

Very truly yours
Mrs Antoinette O'Rouke"

Sworn and subscribed to before me }
this 26th day of November, 1947. }

WILLIAM R. MESTICE,
Notary of N. J.—Real Estate,
314 Waverly Ave., Newark, N. J.
My Commission Expires Sept. 16, 1946.

(Seal)

ORIGINAL LETTER ATTACHED TO ORIGINAL AFFIDAVIT.

Filed Dec. 3, 1947.
Russell C. Gates, Clerk.

Affidavit of Anthony Volpe.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

ANTHONY VOLPE of full age, being duly sworn according to law, upon his oath deposes, and says:

1. That on, or about November 15, 1945, an excavation of about six (6) feet was made in the front of premises, at No. 14 Sixth Avenue, Newark, County of Essex, State of New Jersey for the purpose of lowering an oil fuel tank, and which work was completed in about two (2) weeks.

2. That within the said period of time, and thereafter, said place was barricated with planks, and lantern lights, on both ends of the said excavation, which had been filled with soil, in line with the sidewalk thereto.

3. That on the evening of November 26, 1945, about 9:30 P. M. of that evening, I saw the above plaintiff standing and complaining and who said to have been hurt, not saying when, where, or how, and arguing incoherently. He seemed to be affected of beverage, thereupon, he said "I don't feel any too good", when then, and there, Jerry Volpe, and Ann Volpe, his wife, stepped out of their automobile, and joined in to see what was going on; we, thereupon advised the above said complainant, to go to the drug store to get something so that he could been relieved of his drunkess, which he refused so to do; then we offered to take him home by automobile, but he refused any assistance, and walked away.

ANTHONY VOLPE.

Sworn and subscribed to before me }
this 15th day of March, 1948, A. D. }

WILLIAM R. MESTICE.

Notice of Appeal.

To Frank Masini, Attorney for Anthony Masi, 11 Hill Street, Newark, New Jersey.

Sir:

PLEASE TAKE NOTICE that William R. Mestice, the above defendant-appellant, hereby appeals to the Supreme Court of New Jersey, from the whole of the judgment entered in this cause.

Yours, etc.,

WILLIAM R. MESTICE,
William R. Mestice,
314 Waverly Avenue,
Newark, New Jersey.

Dated: March 27th, 1948, A. D.

Filed: March 31, 1948.
Russell C. Gates, Clerk.

Petition and Jurat.

To Hon. Joseph E. Conlon, Judge of Essex County Court of Common Pleas:

MAY IT PLEASE YOUR HONOR:

The petitioner—William R. Mestice—respectfully shows unto Your Honor:

1. That the above action was commenced by the above plaintiff against the above defendants, on or about April 18, 1946, and a trial hearing was had about November 17, 1947, before a jury, who returned a verdict in favor of the plaintiff, and against the defendant-petitioner to the sum of $2,000.00 with costs.

2. That the plaintiff's complaint consist of injuries suffered by falling before the premises of of the petitioner, commonly known and described as 14 Sixth Avenue, City of Newark, County of Essex, State of New Jersey; and which statement of facts were not proved, at the trial hearing, nor substantiated by a scintilla of evidence, on his part, nor he claimed to be free of contributory negligence, and none of his testimony was corroborated by anybody.

3. That the affidavit submitted herewith, clearly indicates that the plaintiff suffered his complained injuries, not before the premises above indicated, of the defendant-petitioner, but in the vicinity thereto, as Your Honor may have a clear perception by reading the said affidavit. The petitioner, WHEREFORE, respectfully requests of Your Honor, an order to show cause why the said verdict should be set aside and for nothing holden, and judgment be entered in favor of defendant-petitioner, and that in the meantime all proceed-

ings and execution be stayed in the above cause, and Your Honor may grant such other reliefs as may be just and proper in the Premises.

Respectfully submitted,

WILLIAM R. MESTICE.

Jurat.

STATE OF NEW JERSEY, } ss.:
COUNTY OF ESSEX. }

The petitioner—William R. Mestice—being duly sworn according to law, upon his oath, deposes and says:

1. That he is the above defendant-petitioner, and he is familiar with all proceedings being had in the above cause and that all statements made in the foregoing petition, he verily believed them to be true, except as to those informations received from without, and which he also believe them to be true.

WILLIAM R. MESTICE,
314 Waverly Avenue,
Newark, New Jersey.

Sworn and subscribed to before me }
this 16 day of April, A. D., 1948. }

B. M. BERLA,
Master in Chancery of N. J.

Filed: Apr. 26, 1948,
Russell C. Gates, Clerk.

Affidavit of Louis Bourget.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

LOUIS BORGUET, being duly sworn according to law upon his oath deposes and says:

1. That an excavation was made in the front of the premises at 14 Sixth Avenue, City of Newark, County of Essex, State of New Jersey, on or about November 15th, 1945, and then and there an oil fuel tank was lowered, by some colored men, and that every evening I have noticed the very heavy planks were placed across with lights on both sides.

2. That about 9:15 P. M. in the evening of November 26th, 1945, while I was about to cross the street of Cutler Street, and Sixth Avenue, in the City of Newark, County of Essex, State of New Jersey, I have seen a man falling from the steps of the stoop of the pool room on Cutler Street, and Sixth Avenue, whom I helped to get up on his feet, and who was complaining of acute pains about his chest and his right side;

3. That he seemed to be drunk, possibly of wine, I asked him what was his name, and he said, Anthony Masi; that he was living up the Street, and said that he could go home by himself, whereupon, I walked away when he refused my help.

4. That about 9:45 P. M., of the same evening of November 26th, 1945, on my way home, I have noticed that the planks and lights were still at the same place, undisturbed, in the front of the said premises—14 Sixth Avenue—Newark, County of Essex, State of New Jersey.

Affidavit of Louis Bourget.

5. That I have followed closely this case, and through reading the papers, I have learned that there is an outstanding judgment against the defendant Mestice, and in favor of Anthony Masi, the plaintiff, and I have also learned from the newspapers, that his said properties are for sale to satisfy the said judgment of over $2,000.00 in favor of the said plaintiff, Anthony Masi.

6. That I have personally approached the above defendant William R. Mestice, and I have spontaneously told him of the above facts, to the end that he may not become a victim of an unfounded, injurious, and unjustifiable claim, for injuries by the above said plaintiff, Anthony Masi, which were sustained by him—as aforesaid—by falling from the said brick-steps, and by knocking his chest against the lime-stone, placed over the brick parapet, which is a constituent part of the said stoop, and brick steps leading to the side-walk, and that said steps are some-what dark at night.

LOUIS BORGUET.

Sworn and subscribed to before me,
this 21 day of April, 1948, A. D.

BEN J. DAVELL,
Notary Public of New Jersey,
My Commission Expires 3/5/52.

(Seal)

Filed April 28, 1948.
Russell C. Gates, Clerk.

Notice of Appeal.

To Hon. Judge Joseph E. Conlon and John Laird

PLEASE TAKE NOTICE that I hereby appeal from the whole of the Judgment and sentence in the above contempt to the Supreme Court of New Jersey, and

PLEASE TAKE FURTHER NOTICE that an Appeal Bond being already filed in the above matter, I pray the continuance thereof, pending said appeal, and I be release therefor.

Very respectfully yours,

WILLIAM R. MESTICE,
314 Waverly Avenue,
Newark, N. J.

Dated: June 11, 1948.

Filed: June 11, 1948.
Russell C. Gates, Clerk.

Sentence.

ESSEX COMMON PLEAS.

Friday, June 11, 1948.

The Court met

Present

HON. JOSEPH E. CONLON,
Presiding.

In Re: WILLIAM R. MESTICE.	On Conviction for Criminal Contempt of Court.

The above named defendant, William R. Mestice having been heretofore convicted of Criminal Contempt of Court, the Court (Judge Conlon) do order and ajdudge that said defendant, William R. Mestice be imprisoned in the Penitentiary of this County for a term of Six Months; and upon the payment of a ($1,000.) One Thousand Dollar fine, Three months shall be suspended, or until said defendant be discharged by due course of law.

APPENDIX III.

Notice of Motion by John A. Laird.

To: William R. Mestice,
314 Waverly Avenue,
Newark, New Jersey.

Sir:

PLEASE TAKE NOTICE, that on Monday, November 15th, 1948, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply before the Appellate Division of the Superior Court of New Jersey, at the Hall of Records, High Street, Newark, New Jersey, for an order dismissing the appeal filed by you in connection with the conviction for contempt of Court, entered before the Essex County Court of Common Pleas (Honorable Joseph E. Conlon, presiding), on June 11th, 1948, and upon which motion I shall rely upon the affidavit attached hereto and made a part hereof.

Yours respectfully,

JOHN A. LAIRD,
Amicus Curiae.

Affidavit of John A. Laird.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

JOHN A. LAIRD, being duly sworn, according to law on his oath deposes and says:

This matter had its inception in a negligence action in which one Anthony Masi was the plaintiff and William R. Mestice the defendant, in which action, tried before the Honorable Joseph E. Conlon, in the then Essex County Court of Common Pleas, the plaintiff recovered a judgment in the sum of Two Thousand Dollars ($2,000.00).

Thereafter the defendant, Mestice, obtained a rule to show cause for a new trial, and in connection therewith submitted to the Court certain affidavits, the apparent purpose of which was to indicate the existence of newly discovered evidence warranting a new trial. Certain matters contained in these affidavits having aroused the suspicion of the trial judge, said judge thereupon requested your affiant, as *amicus curiae* to make an investigation of the matter and report back to him. As a result of such investigation it was determined that said William R. Mestice should be charged with contempt and ultimately a hearing on contempt charges was had, with the resultant conviction of the defendant under date of June 11th, 1948, and the sentencing of the defendant to both fine and imprisonment.

On June 11th, 1948 the defendant filed a notice of appeal with the County Clerk and thereafter obtained from the Supreme Court a rule upon the County Clerk to certify the record to the Supreme Court, said rule having been signed by Mr. Justice Burling, dated August 17th, 1948, and entered in the Supreme Court Clerk's office under

date of August 27th, 1948, a copy of said rule now being in the Essex County Clerk's Office.

Thereafter as your affiant is informed the defendant obtained from the official stenographer, a copy of the minutes of the hearings upon the contempt proceedings, but investigation in the office of Essex County Clerk, and of the Supreme Court Clerk in Trenton (now the Superior Court) reveal that no further steps have been taken in the prosecution of this appeal.

The notice of appeal as filed fails to indicate that said notice was ever served upon anyone and no further steps appear to have been taken in the cause since the filing of the notice of appeal on June 11th, 1948, other than the filing of a bond in the sum of $2,500.00, under which bond the defendant was released from custody.

JOHN A. LAIRD.

Sworn and subscribed to before me
this 30th day of October, 1948.

SAMUEL H. BERLIN,
An Attorney at Law of New Jersey.

Brief of Appellant by Salvatore Muscato, Attorney for Defendant-Appellant; Eugene A. Liotta, of Counsel.

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION.

STATE OF NEW JERSEY, Plaintiff-Respondent, *vs.* WILLIAM R. MESTICE, Defendant-Appellant.	On Appeal for Contempt. Brief.

Salvatore Muscato, Esq.,
Attorney for Defendant-Appellant,
1007 Springfield Avenue,
Irvington, New Jersey.

Eugene A. Liotta, Esq.,
Of Counsel with Defendant-Appellant.

Statement of Questions Involved.

1. Should a judgment of conviction for contempt be sustained in a proceeding wherein the offense was not committed in the presence of the court?
2. Can the court in a civil proceeding deprive a defendant charged with the commission of subordination of perjury convict without indictment and without trial by jury, and the court should have assigned counsel to assist the defendant in his defense.

Appendix III—Brief of Appellant.

Statement of Facts.

Suit was brought by Anthony Masi against William R. Mestice which was tried before Honorable Joseph E. Conlon, Judge of the Essex County Court of Common Pleas. There were questions of fact raised at the trial which were submitted to the jury, and which were resolved against the defendant. Subsequently an application was made to the court for a rule to show cause why a new trial should not be granted. The defendant appeared before the court with counsel, and on the argument submitted affidavits, many of which had been prepared by the defendant himself. The various affidavits, however, were not made in the presence of the court. The court felt that on their face the affidavits were suspicious as to veracity. The rule was discharged on the 19th day of January, 1948.

Subsequently the defendant himself made a further application for a rule to show cause, and in the application, amongst others, an affidavit of Louis Bourget was submitted, which affidavit was not made in the presence of the court. In the affidavit Louis Bourget stated that he knew nothing of the action against the defendant until he saw an advertisement in the paper that the defendant's property was to be sold at a sheriff's sale as a result of the judgment entered therein; that he personally approached the defendant and volunteered the information, which information indicated that the plaintiff had not been injured in the manner testified to at the trial; that he told the defendant the above facts. When the affidavit was presented to the court, the court became suspicious and thereupon issued a rule to show cause

(Case, page 160); took testimony, advised the defendant to procure counsel. The defendant did not procure counsel nor was any counsel assigned to him. The case was subsequently tried without an indictment being presented and without a trial by jury. No one represented the defendant and the court thereafter found as a matter of fact that the affidavits were perjured; that the perjury was procured by the defendant; that the situation presented a bold and deliberated attempt to interfere with the proper administration of justice by the use of affidavits containing perjury and thereupon found the defendant guilty of criminal contempt and imposed sentence.

ARGUMENT.

POINT I.

Should a judgment of conviction for contempt be sustained in a proceeding wherein the offense was not committed in the presence of the court.

It is provided in Revised Statutes 2:15-1 that,

> "The power of any court of this state to punish for contempt should not be construed to extend to any case except that:
>
> a. Misbehavior of any person in the actual presence of the court;
>
> b. Misbehavior of any officer of the court in his official transactions; and
>
> c. Disobedience or resistance by any court officer, or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the court."

Contempts are of two sorts, civil and criminal. In a civil contempt the proceeding is remedial; it is a step in the cause the object of which is to coerce one party for the benefit of the other party to do or to refrain from doing some act specified in the order of the court. Hence, if imprisonment is ordered it is remedial in purpose and coercive in character, and to that end must relate to something to be done by the defendant by the doing of which he may discharge himself. As quaintly expressed, the imprisoned man "carries the keys to his prison in his own pocket." *Re: Nevitt,* 54 C. C. A. 622; 117 Fed. Rep. 451.

Criminal contempts, on the other hand, as the term implies are offenses against organized society which, although they may arise in the court of private litigation, are not a part thereof, but, like other criminal offenses, raise an issue between the public and the accused. Hence, if imprisonment be adjudged it is, by analogy with the criminal law, punitive in purpose and definite in character. So marked is the difference between the two sorts of imprisonment that it serves as a practical test by which the two sorts of contempt may be distinguished.

In early times such contempt was punished only by the usual criminal procedure (3 Trans. R. His. Soc (N. S.) 147, 1885). Gradually the courts in various instances in order to protect the dignity of such courts have repeatedly held that any act which would be scandalous or where by perjuring a statement attempted to induce the court, the court would be shirking in its duty if it failed to punish such person for contempt. *Edwards* v. *Edwards,* 87 N. J. Eq. 548.

There are numerous decisions in the State of New Jersey following such construction. However, the said decisions were all prior to the enactment by the Legislature of the statute hereinabove referred to. It is my opinion that the Legislature enacted such Legislation because of the decisions of the courts heretofore rendered wherein a person who committed a crime could be adjudicated and punished both civilly and criminally and the only time that the Legislature by its enactment gave the power to the court to punish for contempt is where the act was an impeachment and in the presence of the court. All of the affidavits referred to by the court were all taken without its presence.

It was held in *re: Jibb*, 123 N. J. Eq. 251, in an opinion written by Justice Bodine that,

> "The false affidavit was not made in the presence of the court and was an offense against organized society and like other criminal offenses raised an issue between the public and the accused."

The above decision was rendered prior to the enactment of the Legislature hereinabove mentioned. It was held by the Court of Errors and Appeals in *re: Schwartz*, 46 A. 2d 804, in an opinion written by Justice Colie that,

> "No power of any court in this state to punish for contempt shall be construed to extend to any case except the misbehavior of any persons in its actual presence."

It is undisputed in this cause that the offense committed was not in the presence of the court.

POINT II.

Can the court in a civil proceeding deprive a defendant charged with the commission of subornation of perjury be convicted without indictment and without trial by jury, and the court should have assigned counsel to assist the defendant in his defense.

Article I, Section 8 of the Constitution of New Jersey of 1947, provides:

> "No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger."

Article I, Section 9, of the Constitution of New Jersey of 1947, provides:

> "The right of trial by jury shall remain inviolate; but the Legislature may authorize the trial of civil causes by a jury of six persons when the matter in dispute does not exceed fifty dollars. The Legislature may provide that in any civil cause a verdict may be rendered by not less than five-sixths of the jury. The Legislature may authorize the trial of the issue of mental incompetency without a jury."

Article I, Section 10, of the Constitution of New Jersey of 1947, provides:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense."

It is, therefore, respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

SALVATORE MUSCATO,
Attorney for Defendant-Appellant,

EUGENE A. LIOTTA,
Of Counsel wth Defendant-Appellant.

Affidavit of Eugene A. Liotta.

STATE OF NEW JERSEY, }
COUNTY OF UNION. }

EUGENE A. LIOTTA, being duly sworn according to law upon his oath deposes and says that:

He submitted five original copies of the within brief of defendant-appellant to the Appellate Division of the Superior Court of New Jersey, at the Hall of Records, Newark, N. J., and that he further served John A. Laird, attorney for plaintiff-respondent with two copies of the same. Deponent further says that on the 20th day of December, 1948, John A. Laird, attorney for plaintiff-respondent, served him with a copy of his brief in the cause.

EUGENE A. LIOTTA.

Sworn and subscribed to before me }
this 8th day of March, 1949. }

OLGA SIRALE,
A Notary Public of New Jersey.

December 16, 1948.

John A. Laird
17 Academy St.
Newark 2, N. J.

Re: *State of New Jersey* vs. *William R. Mestice.*

Dear Mr. Laird:

I am enclosing herewith two copies of Brief in the above entitled matter.

Very truly yours,

EUGENE A. LIOTTA.

EAL:s

Order Dismissing Appeal.

The defendant, William R. Mestice having been convicted of contempt of Court before the Honorable Joseph E. Conlon of the then Essex County Court of Common Pleas, for a contempt committed in the face of said Court under date of June 11th, 1948, and the defendant upon said date having filed a notice of appeal, and it appearing to the satisfaction of this Court that since said date the defendant has taken no steps in the prosecution of said appeal other than the filing of a transcript of the testimony and the posting of a bond in the sum of $2,500.00 under which bond the defendant was released from custody, and upon a motion being made to dismiss said appeal for lack of prosecution, and the same coming on to be heard (following several adjournments) on December 20th, 1948 and the defendant being represented by Eugene Liotta and John A. Laird appearing as *Amicus Curiae*, and the Court being of the opinion that the motion to dismiss should be granted,

It is, on this 24th day of December, 1948, ordered, that the appeal of William R. Mestice from his conviction for contempt, be and the same hereby is dismissed for lack of prosecution.

John B. McGeehan,
S. J. A. D.

Mandate on Dismissal.

This cause having been duly argued before this Court by Eugene Liotta, counsel for the appellant and John A. Laird, appearing as *Amicus Curiae,* counsel for the respondent, and the Court having considered the same,

It is hereupon ORDERED and ADJUDGED that the appeal of the said William R. Mestice from his conviction for contempt is dismissed for lack of prosecution and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Petition for Certification has been filed or is pending or unless otherwise ordered by this Court, and that the record be remitted to the Essex County Court of Common Pleas (now County Court of Essex County) to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the order of this Court.

WITNESS the Honorable John B. McGeehan, Senior Judge, Appellate Division at Trenton on the 24th day of December, 1948.

I. GRANT SCOTT,
Clerk of the Superior Court.

Bench Warrant.

ESSEX COUNTY COURT.

Jauuary 6, 1949

The Court Met

Present

HON. JOSEPH E. CONLON,
Presiding.

IN THE MATTER *of* WILLIAM R. MESTICE Charged with Contempt.	On Conviction for Criminal Contempt of Court.

It appearing to this Court that the record of the above entitled matter was removed into the Superior Court, Appellate Division, and that the said Court did Order and Adjudge that the Appeal of William R. Mestice from his conviction for contempt be dismissed for lack of prosecution and a Mandate on Dismissal dated December 24, 1948 having duly issued out of said Superior Court remitting to the Essex County Court the record in said matter to be there proceeded with in accordance with the rules and practice relating to that Court consistent with the Order of said Superior Court.

Therefore on this 6th day of January, 1949, on motion of John A. Laird, Esq., appearing as *Amicus Curiae*, it is,

Notice of Appeal.

ORDERED, that the said William R. Mestice be remanded into the custody of the Warden of the Common Jail of this County, thence conveyed by the Sheriff of this County into custody of the Warden of the Essex County Penitentiary there to complete his term of sentence upon the original commitment; said defendant being out on bail pending the disposition of the above appeal,

The Court FURTHER ORDERS that a Bench Warrant issue for the arrest of the said defendant.

JOSEPH E. CONLON,
Judge, Essex County Court.

Filed: January 7, 1949.

Russell C. Gates, County Clerk.

Notice of Appeal.

NOTICE is hereby given that the defendant-appellant—William R. Mestice—appeals to the Supreme Court of New Jersey from the final judgment, which was lately entered against said defendant, and the filed bond, or bonds, be continued for the purpose thereof.

WILLIAM R. MESTICE,
William R. Mestice, *Pro Se.*
314 Waverly Avenue,
Newark, New Jersey.

Dated: January 15, 1949.

Notice of Appeal.

To John A. Laird, Amicus Curiae, in the above matter, 17 Academy Street, Newark, New Jersey.

Dear Sir:

PLEASE TAKE NOTICE that I have taken an appeal to the Supreme Court of New Jersey in the above matter; and you are hereby requested to set aside, or to withdraw any order, or warrant which may been issued, or that you have caused to have been issued which may in any way affect, or effect the restraining of liberty, or locomotion of the above defendant-appellant, pending the disposition of the above contempt proceedings in the Supreme Court of New Jersey.

Yours, etc.,

WILLIAM R. MESTICE,
William R. Mestice, *Pro Se.*

Letter to Hon. Nathan Jacobs, Judge of A. D.

January 31st, 1949
Newark, N. J.

Honorable Nathan Jacobs,
The Superior Court of New Jersey,
Appellate Division,
Court House,
Newark, N. J.

Re: *State of New Jersey* vs. *Mestice*
and *Masi* vs. *Mestice.*

Honorable Sir:

There is an outstanding order, signed by your Honor, in that briefs, and appendix should be filed by February 3rd, 1949, in failure whereof the appeal of *Masi* vs. *Mestice* would be dismissed, etc.

That in the Matter of Contempt, same being an outgrowth of the said case of *Masi* vs. *Mestice* has been dismissed on account of lack of prosecution on the part of the lawyers, Salvatore Muscato, of 1007 Springfield Avenue, Irvington, N. J. and of Eugene Liotta, of counsel, of East Jersey Avenue, Elizabeth, N. J., and a Mandate issued against my body, for the said failure to prosecute, on the part of the said attorneys to whom I have given, once $250.00—$500.00—and $250.00—total $1,000.00.

Therefore, being that there is no fault on my part, there is no reason to hold me responsible, and to have me penalized.

In the light whereof, I respectfully request to honor the enclosed orders for the purpose thereof, and to the end that my appeals will be personally prosecuted, and to the end that the judgments of

the Court below, be reversed, and my name and reputation be cleared, and my legal rights, and privileges be restored to status *quo ante.*

Respectfully yours,

WILLIAM R. MESTICE,
Box 249—Caldwell, N. J.

Notice of Appeal.

To: John A. Laird—Amicus curiae, 17 Accademy St., Newark, N. J. and Frank G. Masini—Attorney for the plaintiff, 11 Hill St., Newark, New Jersey.

Gentlemen:

NOTICE is hereby given that the above defendant-appellant—William R. Mestice—appeals to the Supreme Court of New Jersey from the final judgments (entered in above dockets), of the Appellate Division of the Superior Court, and of all orders entered thereto, as well of those judgments and orders entered in the Essex County Court, and the former County Court of Common Pleas (docket No. 84192/564) thereof.

Very truly yours,

WILLIAM R. MESTICE,
William R. Mestice, *Pro Se.*,
314 Waverly Avenue,
Newark, New Jersey.

Dated: July 18, 1949, A. D.

Affidavit of William R. Mestice.

STATE OF NEW JERSEY, }
COUNTY OF MONMOUTH. } ss.:

WILLIAM R. MESTICE, of full age, being duly sworn says:

1. That I am the above appellant.

2. That a Notice of Appeal has been filed with the above Court, and that a copy thereof has been served upon the attorneys of record.

3. That a Notice of Motion has been filed with this Court and a copy thereof has been served on the attorneys of record.

4. That Frank Masini has obtained an *Ex Parte* Order on the 29th day of August, last past, vacating the order staying execution previously rendered by the former Essex County Common Pleas Court.

5. That notwithstanding the aforesaid Notice of Appeal and Notice of Motion before the Supreme Court of New Jersey, the above said plaintiff's attorney has conducted a sale of my real estate on the 25th day of October, 1949.

6. That the attorney for the above plaintiff, Leslie Kohn, co-partner of the said Masini has instituted proceedings against the sureties, notwithstanding the fact that the bonds filed with the Courts below were to be continued for the purpose of the appeals to this Court, at the request of the said plaintiff's attorneys; however Supersedeas Bond has been filed with this Court, and the said attorneys has received a copy thereof.

Notice of Petition for Certification.

WHEREFORE, I demand that the order of Judge Francis, of the Court below be set aside, and for nothing holden.

WILLIAM R. MESTICE.

Sworn and subscribed to before me this 26 day of October, 1949 A. D.

BERNARD V. POLAND,
Attorney at Law of N. J.

Notice of Petition for Certification.

To: Frank Masini, Attorney for the Plaintiff, 11 Hill Street, Newark, New Jersey.

Leslie Kohn, Attorney for the plaintiff, 790 Broad Street, Newark, New Jersey.

John A. Laird, Amicus Curiae, 17 Academy Street, Newark, New Jersey.

Sirs:

NOTICE is hereby given to you, that the defendant-appellant, William R. Mestice, will petition to the Supreme Court of New Jersey, for certification to the Appellate Division, to review all judgments, and all orders of whatever kind touching, or reflecting in the above matters, which have been entered in the above Court, and the Court below, in favor of the plaintiff, and against the above appellant; and more particularly, based upon the "Petition for Certification" served by

the appellant at your office, as above indicated, on the 3rd day of November, 1949.

WILLIAM R. MESTICE,
William R. Mestice,
314 Waverly Avenue,
Newark, New Jersey.

Dated: November 7th, 1949.

N. B. Please take further notice that a "Supersedes Bond" has been approved and filed with the above Court.

WM. R. MESTICE.

Petition for Certification.

To the Honorable the Chief Justice Arthur T. Vanderbilt and Associate Justices of the Supreme Court of New Jersey:

May It Please Your Honors:

The above defendant-appellant, William R. Mestice, respectfully shows unto Your Honors:

1. That the above plaintiff has recovered a judgment in the sum of $2,000.00, in the former Essex County Court of Common Please, on November 20th, 1947.

2. The above appellant demanded for a trial *de novo,* based on newly discovered evidence, which evidence would have proved that the claim of the plaintiff was false, that his witnesses were manifestly perjurious, that its lawyers had procured false counter-affidavits, and that the po-

lice record was in sharp contrast from the testimony of the policemen, who very strongly impressed the jury to the detriment of the defendant.

3. The presiding Judge, however, in order to destroy the meritorious, newly discovered evidence, wrongfully held the defendant in contempt, and carried out his design by appointing one John A. Laird as *amicus curiae,* and, summarily, has inflicted upon the above appellant an infamous sentence, which it has no precedence in the history of New Jersey; and

4. Therefore, said presiding Judge—Joseph E. Conlon—has violated the due process clause of the Fourteenth Amendment of the United States Constitution; and the New Jersey Statutory provisions of Article 1, of Rights and Privileges No. 8, 9, 10, 11, 12; and the New Rules of Practice 2:8-1, 2:8-2, a, d, e; 2:8-3; 2:9-1, a; 2:9-2; 2:9-3; 2:20-5; 2:15-7-8; 3:10-4; 2:15-1; 3:80-1; 3:80-2, d; 3:80-3; and the following Canons of Judicial Ethics: No. 15, 16, 18, 19, 20, 21, 22, 34, 36 thereof.

5. Moreover the affidavits of the appellant, as submitted were presented in good faith, and decorum, therefore there was no contempt in the actual presence of the Court, and the facts therein contained were not criminal, nor civil in contempt, but the newly discovered evidence were meritorious facts which had to be judged by an impartial jury, and not by Judge Joseph E. Conlon, and his accomplice John A. Laird.

6. The appeal before the Superior Court—Appellate division, has been one of mockery. Said appeal has been dismissed for lack of prosecution, where in fact briefs had been submitted by the defendant's attorney, and by the said *amicus curiae,* John A. Laird.

7. Similarly has been with the appeal of the Civil action against the above plaintiff, the said Appellate Division has done everything to cover up their Judicial Associate by putting additional decorative words of praise; "A study of the Court's charge to the jury reveals that it was full, fair and without error."

That the appellant is not guilty of *laches*, but that he has patiently waited for the result of the appeal as against the above plaintiff, from the said Superior Court, Appellate Division, so that he could have submitted to the Supreme Court of New Jersey, all, or a good part of the facts involved, and of the persecution suffered with malice.

WHEREFORE, since said presiding Judge was legally disqualified, by the Rule 2:8-2, d, etc., and for the reasons set forth, I respectfully demand certification, so that I may proceed.

WILLIAM R. MESTICE.

Nov. 2, 1949.

Opinion.

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION.

A-72 SEPTEMBER TERM, 1948.

ANTHONY MASI, Plaintiff-Respondent, *vs.* WILLIAM R. MESTICE, Defendant-Appellant.	On Appeal from the Essex County Court. Before McGeehan, Donges and Colie, *JJ.*

Argued May 2, 1949. Decided July 11, 1949.

Mr. JULIUS STEIN argued the cause for appellant.

Mr. FRANK A. MASINI argued the cause for respondent.

The opinion of the court was delivered by COLIE, *J.*

Plaintiff appeals from a judgment entered against him in the former Essex County Court of Common Pleas, now the Essex County Court. The action was instituted by the plaintiff to recover damages against the defendant and one Jerry Fiore; one count sounding in nuisance; the other count sounding in negligence. The defendant Fiore prevailed on a motion for nonsuit and therefore is out of the case. The jury returned a verdict in favor of the plaintiff against the remaining defendant and it is from this judgment that the appeal is taken.

It is argued before this court that the appeal should be dismissed because it was not perfected in accordance with the law in effect at the time that the appeal was taken. We think this is so but we pass the point and choose to deal with the case on its merits.

The first point argued by the defendant has to do with remarks of the judge made during the course of the trial which were alleged to be highly prejudicial to the defendant. Our examination of the record convinces us that the remarks in no wise harmed the defendant, but assuming that they did, this point is not available since there was no motion on behalf of the defendant for either a mistrial, nor was there a request by the defendant to the court for an instruction to the jury that they disregard the alleged prejudicial remarks. In the absence of such a request no legal error is raised on the basis of a ground of appeal. *McCusker* v. *B. & N. Transp. Co.*, 106 N. J. L. 167 (E. & A., 1930).

The second point argued is that the trial court did not present to the jury all of the factual issues to be decided by it and thereby committed reversible error The argument is to the effect that the court erred in failing to charge that if the work in excavating which caused the accident was done by an independent contractor and done negligently, resulting in injury to the plaintiff, the independent contractor was liable and not the defendant. Suffice it to say that there was no evidence that the work was done by an independent contractor and therefore there was no error in the charge of the court in that respect.

The third point argued is that the court abused its discretion in refusing to consider the defendant's requests to charge. As to this point, suffice

it to say that a request to charge should be submitted to the trial court at or before the close of the evidence and before the beginning of argument. *Harris* v. *Lahn*, 122 N. J. L. 91 (E. & A., 1939). The defendant did not submit the requests until after the completion of summation of counsel. The judge was well within his discretion in refusing to charge in accordance with the request. A study of the court's charge to the jury reveals that it was full, fair and without error.

The judgment under appeal is affirmed.

Notice of Motion.

ESSEX COUNTY COURT.

ANTHONY MASI, Plaintiff, *vs.* WILLIAM R. MESTICE, *Pro Se*, Defendant.	No. 90524; 84192. (12322-294/4; 12365-302/4). Notice of Motion.

To Frank G. Masini, Attorney for the Plaintiff, 11 Hill Street, Newark New Jersey.

Dear Sir:

TAKE NOTICE that last Friday—October 28th—your co-partner Leslie Kohn, for the above plaintiff, appeared in an attempt to get judgments against the sureties, while said sureties have authorized the defendant to prosecute my appeals from the Superior Court—Appellate Division—

to the Supreme Court of New Jersey, and which notice of appeals have been served on all attorneys of record, and of which your said co-partner is fully conscious thereof.

TAKE FURTHER NOTICE, that at the same time I reminded the Hon. Judge John J. Francis, that you had obtained from his Honor an *Ex Parte* Order which vacated the stay of execution on the judgment during my illness due to an accident upon me—the above defendant—and at the same time I have informed his Honor that you had instructed the Hon. Sheriff to sell my real estate, which took place on October 25th, inst. and then and there his Honor adjourned the hearing on the whole for the next coming Friday, at ten o'clock in the forenoon—November 4th, 1949, or soon thereafter as counsels can be heard, and at which time I shall demand his Honor to set aside said *Ex Parte* Order of August 29, 1949, so that the stay of execution may continue to stay, pending the appeals before the said Supreme Court of New Jersey.

Dated: October 29th, 1949, A. D.

Very truly yours,

WILLIAM R. MESTICE,
314 Waverly Avenue,
Newark, New Jersey.

Memo: All motions adjourned for November 11, 1949 by Judge Francis.

Petition—On Appeal from Orders of Essex County Court.

To the Honorable Chief Justice Arthur T. Vanderbilt, and the Associate Justices of the Supreme Court of New Jersey:

The petitioner, William R. Mestice, respectfully shows:

1. That the above appellant is prosecuting an appeal against the above plaintiff, before the Supreme Court of New Jersey, upon a judgment which was rendered in favor of the said plaintiff, and against the petitioner, to the sum of $2,000.00, before the former Essex County Court of Common Pleas.

2. That a "Notice of Appeal" has been filed with the said Supreme Court of N. J., together with a "Notice of Petition For Certification"; a "Petition For Certification"; a "Supersedeas Bond" has also been filed and approved with the Superior Court of N. J., Appellate Division; and copies of which have been served to the attorneys of record, namely Frank G. Masini, and his co-partner, and associate Leslie Kohn.

3. That an *Ex Parte* Order was signed by Hon. John J. Francis, Judge of the aforesaid Essex County Court, vacating the stay of execution, on the aforesaid judgment, on the 29th, day of August, 1949, and on October 25th, 1949, there was a sale of the above defendant-appellant's real estate to Frank G. Masini's office secretary, of Nine (9) Family Brick Building, for $500.00, and a 16 family brick building for $300.00, notwithstanding the fact that the appeal is pending before the said Supreme Court of N. J., and the said Supersedeas Bond has been filed, copies of which have been

served upon the said attorneys of record, and upon the Sheriff for the Essex County.

4. That the said Sheriff had refrained himself from issuing deeds on my real estate, pending the motions before the said Hon. Judge Francis, which were presented by the said Leslie Kohn, Frank G. Masini, and the Counter Motion Notice of the petitioner, which were heard on the 4th day of November, 1949, and after hearing all parties concerned, the Court ordered the said attorneys, Leslie Kohn, and Frank Masini, to stay all proceedings as against the sureties, and the sale of real estate of mine, until said attorneys would have obtained an order from the Supreme Court, dismissing the said pending appeal, together with the "Petition For Certification", before the said Supreme Court; and adjourned all motions for one week.

5. That the said Frank Masini, however, has wilfully ignored, and disregarded the Court's Orders, and in violation whereof, has compelled the said Sheriff the issuance of deeds against my real estate, which have the valuation of between $25,000.00 and $30,000.00 each, on the 10th day of November, 1949; and which have an income of $800.00 per month.

6. That the sale of my real estate, as made, is, in fact, fraudulent, contemptable, and in violation of Statutory provisions so made and provided in R. S. 2:75-1, which it requires publication for four (4) times consecutive weeks in two (2) newspapers of this County. The First publication shall be at least twenty-one (21) days prior, and the last publication not more than eight (8) days prior to the time appointed for the sale of such

real estate; and in interest of justice, it may be published in three (3) newspapers.

7. Moreover, the sale of real estate must be confirmed by the Court; and the Sheriff has to certify, under oath, that the sale was made according to law, and that the real estate was sold for a fair price, and that it was not injurious to the parties in interest—R. S. 2:75-6-7, and that it was sold to a *bona fide* purchaser; and, in this case, the sale is purely a deliberate fraud on the part of Frank G. Masini, in a direful attempt to steal the petitioner's property, for his personal benefit, and besides the Statutory provisions, which the said attorneys of record have contemptuously violated unethically; and who has had the audacity to write the mortgagee, as to what may be the unpaid balance, etc.; and such is the type of legal practice of these associates—Frank G. Masini, and of Leslie Kohn, who, fabulously, might have induced the Honorable Judge of this Court, to deny the stay of execution, or to vacate the same to the detriment of the appellant.

8. That the appellant, due to an accident, has a broken back, for the reason whereof, he has been physically incapacitated to prosecute the appeal, and the said *Ex Parte* Order, which was signed by the said Hon. Judge Francis, was obtained by the attorneys of record when the petitioner was still at the Fitkin Memorial Hospital, Neptune, N. J., covered with cast of plaster, and of which condition, said attorneys were fully conscious thereof.

WHEREFORE, the petitioner prays that a rule to show cause be issued by this Court, why the stay of execution should not be continued, or granted, and why the order of August 29th, 1949, should

not be set aside, vacated, and for nothing holden, that the action against the sureties be dismissed, pending the appeals before the Supreme Court of New Jersey, and the sale of my real estate be declared as null and void.

And your petitioner will ever pray, etc.

WILLIAM R. MESTICE.
William R. Mestice,

Dated: November 26th, 1949.